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How to Cure Health Care

Milton Friedman

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Politics in a Brave New World

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BOOKS IN REVIEW:

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Editorial Office
1112 16th Street, NW, Suite 530
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How to cure health care

MILTON FRIEDMAN

SINCE the end of World War II, the provision of medical care in the United States and other advanced countries has displayed three major features: first, rapid advance in the science of medicine; second, large increases in spending, both in terms of inflation-adjusted dollars per person and the fraction of national income spent on medical care; and third, rising dissatisfaction with the delivery of medical care, on the part of both consumers of medical care and physicians and other suppliers of medical care.

Rapid technological advance has occurred repeatedly since the industrial revolution—in agriculture, steam engine, railroad, telephone, electricity, automobile, radio, television, and, most recently, computers and telecommunication. The other two features seem unique to medicine. It is true that spending initially increased after nonmedical technical advances, but the fraction of national income spent did not increase dramatically after the initial phase of widespread acceptance. On the contrary, technological development lowered cost, so that

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the fraction of national income spent on food, transportation, communication, and much more has gone down, releasing resources to produce new products or services. Similarly, there seems no counterpart in these other areas to the rising dissatisfaction with the delivery of medical care.

I. International comparison

These developments in medicine have been worldwide. By their very nature, scientific advances know no geographical boundaries. Data on spending are readily available for 29 Organization for Economic Cooperation and Development (OECD) countries. In every one, medical spending has gone up both in inflation-adjusted dollars per person and as a fraction of national income. Data are available for both 1960 and 1997 for 21 countries. In 13, spending more than doubled as a fraction of gross domestic product. The smallest increase was 67 percent, the largest, 378 percent. In 1997, 16 of the 29 OECD countries spent between 7 percent and 9 percent of gross domestic product on medical care. The United States spent 14 percent, the highest of any OECD country. Germany was a distant second at 11 percent; Turkey was the lowest at 4 percent.

A key difference between medical care and the other technological revolutions is the role of government. In other technological revolutions, the initiative, financing, production, and distribution were primarily private, though government sometimes played a supporting or regulatory role. In medical care, government has come to play a leading role in financing, producing, and delivering medical service. Direct government spending on health exceeds 75 percent of total health spending for 15 OECD countries. The United States is next to the lowest of the 29 countries, at 46 percent. In addition, some governments indirectly subsidize medical care through favorable tax treatment. For the United States, such subsidization raises the fraction of health spending financed directly or indirectly by government to over 50 percent.

What are countries getting for the money they are spending on medical care? What is the relation between input and output? Spending on medical care provides a reasonably good measure of input, but, unfortunately, there is no remotely satisfactory objective measure of output. For the hospital seg-

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ment, number of beds occupied may at first seem like an objective measure. However, improvements in medicine have included a reduction in the length of hospital stay required for various medical procedures or illnesses. So, fewer patient days may be a sign of greater, not lesser, output. The desired output of medical care is "good health." But how can we quantify "good health," and equally important, allow for the role that factors other than medical care—such as plentiful food, pure water, and protective clothing—play in producing "good health"?

The least objectionable measure I have been able to find is expected length of life at birth or at various later ages, though that too is a far from unambiguous measure of the output attributable to spending on medical care. The remarkable increase in life span in advanced countries during the past century reflects much more than spending on medical care proper. Moreover, it does not allow for changes in the quality of life—attempted measurement of which is still in its infancy.

Figure 1 (see Appendix, pp. 23-30) shows the relation in 1996 for the 29 OECD countries between the percentage of the gross domestic product spent on medical care and the expected length of life at birth for females.[1] The relation is clearly positive, though very loose.[2] The United States and Germany are clear outliers, ranking first and second in spending but twentieth and seventeenth in length of life. As another indication of looseness, nine countries spent between 7 and 8 percent of GDP on medicine. The group includes Japan, which has the highest expected length of life (83.6 years), and the Czech Republic, fourth from the bottom (77.3 years). Clearly, many factors other than spending on medical care affect expected length of life.

Exploring that relation more fully, however worthwhile a

[1] Females only are included to remove one source of irrelevant difference among countries. In general, females tend to have a longer expected length of life than males, and countries differ in the ratio of males to females. The correlation of expected length of life with per capita spending on medical care in dollars is almost the same as with percent of GDP spent on medical care.

[2] The correlation is partly spurious because percent spent tends to be positively correlated with real GDP, and real GDP is positively correlated with length of life for given percent spent. However, the partial correlation of percent spent with length of life is statistically significant and higher than the partial correlation of real GDP with length of life.

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project, is not the purpose of this article, which is to examine the situation in the United States. I have presented the data on the OECD countries primarily to document the two (related?) respects in which the United States is an outlier: We spend a higher percentage of national income on medical care (and more per capita) than any other OECD country, and government finances a smaller fraction of that spending than all except Korea.

II. Why third-party payment?

Two simple observations are key to explaining both the high level of spending on medical care and the dissatisfaction with that spending. The first is that most payments to physicians or hospitals or other caregivers for medical care are made not by the patient but by a third party—an insurance company or employer or governmental body. The second is that nobody spends somebody else's money as wisely or as frugally as he spends his own. These statements apply equally to other OECD countries. They do not by themselves explain why the United States spends so much more than other countries.

No third party is involved when we shop at a supermarket. We pay the supermarket clerk directly. The same for gasoline for our car, clothes for our back, and so on down the line. Why, by contrast, are most medical payments made by third parties? The answer for the United States begins with the fact that medical-care expenditures are exempt from the income tax if, and only if, medical care is provided by the employer. If an employee pays directly for medical care, the expenditure comes out of the employee's income after income tax. If the employer pays for the employee's medical care, the expenditure is treated as a tax-deductible expense for the employer and is not included as part of the employee's income subject to income tax. That strong incentive explains why most consumers get their medical care through their employer or their spouse's or their parents' employer. In the next place, the enactment of Medicare and Medicaid in 1965 made the government a third-party payer for persons and medical care covered by those measures.

We have become so accustomed to employer-provided medical care that we regard it as part of the natural order. Yet it is

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thoroughly illogical. Why single out medical care? Food is more essential to life than medical care. Why not exempt the cost of food from taxes if provided by the employer? Why not return to the much-reviled company store when workers were in effect paid in kind rather than in cash?

The revival of the company store for medicine has less to do with logic than pure chance. It is a wonderful example of how one bad government policy leads to another. During World War II, the government financed much wartime spending by printing money while, at the same time, imposing wage and price controls. The resulting repressed inflation produced shortages of many goods and services, including labor. Firms competing to acquire labor at government-controlled wages started to offer medical care as a fringe benefit. That benefit proved particularly attractive to workers and spread rapidly.

Initially, employers did not report the value of a fringe benefit to the Internal Revenue Service as part of their workers' wages. It took some time before the IRS realized what was going on. When it did, it issued regulations requiring employers to include the value of medical care as part of reported employees' wages. By this time, workers had become accustomed to the tax exemption of that particular fringe benefit and made a big fuss. Congress responded by legislating that medical care provided by employers should be tax-exempt.

III. Effect of third-party payment on medical costs

The tax exemption of employer-provided medical care has two different effects, both of which raise health costs. First, it leads employees to rely on their employer, rather than themselves, to make arrangements for medical care. Yet employees are likely to do a better job of monitoring medical-care providers, because it is in their own interest, than is the employer or the insurance company or companies designated by the employer. Second, it leads employees to take a larger fraction of their total remuneration in the form of medical care than they would if spending on medical care had the same tax status as other expenditures.

If the tax exemption were removed, employees could bargain with their employers for a higher take-home pay in lieu of medical care and provide for their own medical care either

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by dealing directly with medical-care providers or by purchasing medical insurance. Removal of the tax exemption would enable governments to reduce the tax rate on income while raising the same total revenue. This hidden subsidy for medical care, currently more than $100 billion a year, is not included in reported figures on government health spending.

Extending the tax exemption to all medical care—as in the current limited provision for medical savings accounts and the proposals to make such accounts more widely available—would reduce reliance on third-party payment. But, by extending the hidden subsidy to all medical-care expenditures, it would increase the tendency of employees to take a larger portion of their remuneration in the form of medical care. (I will more fully discuss medical savings accounts in the conclusion.)

Enactment of Medicare and Medicaid provided a direct subsidy for medical care. The cost grew much more rapidly than originally estimated—as the cost of all handouts invariably do. Legislation cannot repeal the non-legislated law of demand and supply. The lower the price, the greater the quantity demanded; at a zero price, the quantity demanded becomes infinite. Some method of rationing must be substituted for price and that invariably means administrative rationing.

Figure 2 provides an estimate of the effect on medical costs of tax exemption and the subsequent enactment of Medicare and Medicaid. The top line in the chart is actual per capita spending on medical care expressed in constant 1992 prices, to allow for the effect of inflation. Spending multiplied more than 23-fold from 1919 to 1997, going from $155 per capita to $3,625. The bottom line shows what would have happened to per capita spending if it had continued to rise at the same rate as it did from 1919 to 1940 (3.1 percent per year). On that assumption, per capita spending would have risen to $1,751, instead of $3,625 by 1997, or less than half as much.[3,4]

To estimate the separate effects of tax exemption and of

[3] In an extensive study, the Rand Corporation compared the effect of different health-insurance plans, varying from one with no deductible and no co-payment—that is, free medical care—to one with 95 percent co-payment, very close to complete private responsibility. In his summary of the results, Joseph Newhouse concluded that, "had there been no MDE [maximum deductible expense], demand on the 95 percent coinsurance plan would have been a little over half as large as on the free care plan," and an accompanying table gives 55 percent as the actual fraction.

The 1997 value of the extrapolated trend from 1919-1940 is 48 percent of

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Medicare and Medicaid, the second line shows what would have happened to spending if, after Medicare and Medicaid were enacted, spending had continued to rise at the same rate as it did from 1946 to 1965 (4 percent per year). The segment between the two bottom lines shows the effect of tax exemption; the segment between the two top lines shows the effect of the enactment of Medicare and Medicaid. *According to these estimates, tax exemption accounts for 57 percent of the increase in cost; Medicare and Medicaid, 43 percent.*

Figure 3 presents a different breakdown of the cost of medical care: between the part paid directly by the government and the part paid privately. As the figure shows, the government share has been growing over the whole period. Government's share went from one-eighth of the total in 1919 to nearly a quarter in 1946 to a quarter in 1965 to nearly half in 1997. The rise in the government's share has been accompanied by centralization of spending—from primarily by state and local governments to primarily by the federal government. We are headed toward completely socialized medicine and are already halfway there, if in addition to direct costs, we include indirect tax subsidies.

Expressed as a fraction of national income, spending on medical care went from 3 percent of the national income in 1919 to 4.5 percent in 1946, to 7 percent in 1965 to a mind-boggling 17 percent in 1997.[5] No other country in the world approaches that level of spending as a fraction of national income no matter how its medical care is organized. The change in the role of medical care in the U.S. economy is truly breathtaking. To illustrate, in 1946, seven times as much was spent on food, beverages, and tobacco as on medical care; in 1996, 50 years later, more was spent on medical care than on food, beverages, and tobacco. In 1946, twice as much was spent on

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actual expenditures in 1997, remarkably close to Newhouse's 55 percent, based on a completely independent set of data. See Joseph P. Newhouse, *Free for All? Lessons from Rand Health Insurance Experiment* (Harvard University Press, 1993), p. 458.

[4] Had this been the total expenditure in 1996, the United States would have ranked twenty-first, rather than first, among the 29 OECD countries in fraction of income spent on medical care.

[5] The figure of 14 percent referred to earlier was from OECD data; it referred to 1996 rather than 1997 and to percent of gross domestic product, not national income.

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transportation as on medical care; in 1996, one-and-a-half times as much was spent on medical care as on transportation.

IV. The changing meaning of insurance

Employer financing of medical care has caused the term "insurance" to acquire a rather different meaning in medicine than in most other contexts. We generally rely on insurance to protect us against events that are highly unlikely to occur but involve large losses if they do occur—major catastrophes, not minor regularly recurring expenses. We insure our houses against loss from fire, not against the cost of having to cut the lawn. We insure our cars against liability to others or major damage, not against having to pay for gasoline. Yet in medicine, it has become common to rely on insurance to pay for regular medical examinations and often for prescriptions.

This is partly a question of the size of the deductible and the co-payment, but it goes beyond that. "Without medical insurance" and "without access to medical care" have come to be treated as nearly synonymous. Moreover, the states and the federal government have increasingly specified the coverage of insurance for medical care to a detail not common in other areas. The effect has been to raise the cost of insurance and to limit the options open to individuals. Many, if not most, of the "medically uninsured" are persons who for one reason or another do not have access to employer-provided medical care and are not willing to pay the cost of the only kinds of insurance contracts available to them.

If tax exemption for employer-provided medical care and Medicare and Medicaid had never been enacted, the insurance market for medical care would probably have developed as other insurance markets have. The typical form of medical insurance would have been catastrophic insurance—i.e., insurance with a very high deductible.

V. Bureaucratization and Gammon's Law

Third-party payment has required the bureaucratization of medical care and, in the process, has changed the character of the relation between physicians or other caregivers and patients. A medical transaction is not simply between a caregiver

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and a patient; it has to be approved as "covered" by a bureaucrat and the appropriate payment authorized. The patient, the recipient of the medical care, has little or no incentive to be concerned about the cost—since it's somebody else's money. The caregiver has become, in effect, an employee of the insurance company or, in the case of Medicare and Medicaid, the government. The patient is no longer the one, and the only one, the caregiver has to serve. An inescapable result is that the interest of the patient is often in direct conflict with the interest of the caregiver's ultimate employer. That has been manifest in public dissatisfaction with the increasingly impersonal character of medical care.

Some years ago, the British physician Max Gammon, after an extensive study of the British system of socialized medicine, formulated what he called "the theory of bureaucratic displacement." In *Health and Security*, he observed that in "a bureaucratic system ... *increase in expenditure* will be matched by *fall in production*.... Such systems will act rather like 'black holes,' in the economic universe, simultaneously sucking in resources, and shrinking in terms of 'emitted production.'" Gammon's observations for the British system have their exact parallel in the partly socialized U.S. medical system. Here too input has been going up sharply relative to output. This tendency can be documented particularly clearly for hospitals, thanks to the availability of high quality data for a long period.

Before 1940, output, as measured by number of patient days per 1,000 population (equal to the number of occupied beds per 1,000 population) and input, as measured by cost per 1,000 population, both rose (input somewhat more than output presumably because of the introduction of more sophisticated and expensive treatments). The number of occupied beds per resident of the United States rose from 1929 to 1940 at the rate of 2.4 percent per year; the cost of hospital care per resident, adjusted for inflation, at 5 percent per year; and the cost per patient day, adjusted for inflation, at 2 percent per year.

The situation changed drastically after the war, as Figure 4 and the top part of Table 1 show. From 1946 to 1996, the number of beds per 1,000 population fell by more than 60 percent; the fraction of beds occupied, by more than 20 per-

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cent. In sharp contrast, input skyrocketed. Hospital personnel per occupied bed multiplied nine-fold, and cost per patient day, adjusted for inflation, an astounding 40-fold, from $30 in 1946 to $1,200 in 1996 (at 1992 prices). A major engine of these changes was the enactment of Medicare and Medicaid in 1965. A mild rise in input was turned into a meteoric rise; a mild fall in output, into a rapid decline. The 40-fold increase in the cost per patient day was converted into a 13-fold increase in hospital cost per resident of the United States by the sharp decline in output. Hospital days per person per year were cut by two-thirds, from three days in 1946 to an average of less than a day by 1996.

Taken by itself, the decline in hospital days is evidence of progress in medical science. A healthy population needs less hospitalization, and advances in science and medical technology have reduced the length of hospital stays and increased outpatient surgery. Progress in medical science may well explain most of the decline in output; it does not explain much, if any, of the rise in input per unit of output. True, medical machines have become more complex. However, in other areas where there has been great technical progress—whether it be agriculture or telephones or steel or automobiles or aviation or, most recently, computers and the Internet—progress has led to a reduction, not an increase, in cost per unit of output. Why is medicine an exception? Gammon's law, not medical miracles, was clearly at work. The provision of medical care as an untaxed fringe benefit by employers, and then the federal government's assumption of responsibility for hospital and medical care of the elderly and the poor, provided a fresh pool of money. And there was no shortage of takers. Growing costs, in turn, led to more regulation of hospitals and medical care, further increasing administrative costs, and leading to the bureaucratization that is so prominent a feature of medical care today.

Medicine is not the only area where this pattern has prevailed. Aside from defense and medicine, schooling is the only other major area of our society that is largely financed and administered by government, and here too Gammon's law has clearly operated. Input per unit of output, however measured, has clearly been going up; output, especially if measured in

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terms of quality, has been going down, and dissatisfaction, as in medicine, is growing. The same may well be true also in defense. However, measuring output independently of input is even more baffling for defense than for medicine.

To return to medicine, hospital cost has risen as a percentage of total medical cost from 24 percent in 1946 to 32 percent half a century later. The cost of physician services is currently the second largest component of total medical cost. It too has risen sharply, though less sharply than hospital costs. In 1946, the cost of physician services exceeded the cost of hospital services. According to the estimates in Table 1, the cost of physician services has multiplied four-fold since 1946, the major rise coming after the adoption of Medicare and Medicaid in 1965.

Figure 5 shows what has happened to the number of physicians and their income. The number almost doubled, and the income per physician almost tripled over the half-century from 1946 to 1996. Both reflect the increase in funds available to finance medical care and the third-party character of payment. The demand for physician services went up, and income had to go up to attract additional physicians. Paradoxically, the attempt by third-party payers—particularly the federal government—to keep costs down has been at least partly self-defeating, because it took the form of imposing onerous rules and regulations on physicians. The resultant bureaucratization of medical practice has made the practice of medicine less attractive as an occupation to most actual and potential physicians, which increased the necessary rise in incomes. It has also reduced their productivity.

VI. Medical-care output

So much for input. What about output? What have we gotten in return for quadrupling the share of the nation's income spent on medical care?

I have already referred to one component of output—days of hospital care per person per year. That has gone down from three days in 1946 to less than one in 1996. Insofar as the reduction reflects the improvements in medicine, it clearly is a good thing. However, it also reflects the pressure to keep hospital stays short in order to keep down cost. That this is

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not a good thing is clear from protests by patients, widespread enough to have led Congress to mandate minimum stays for some medical procedures.

The output of the medical-care industry that we are interested in is its contribution to better health. How can we measure better health in a reasonably objective way that is not greatly influenced by other factors? For example, if medical care enables people to live longer and healthier lives, we might expect that the fraction of persons aged 65 to 70 who continue to work would go up. In fact, of course, the fraction has gone down drastically—thanks to higher incomes reinforced by financial incentives from Social Security. With the same "if" we might expect the fraction of the population classified as disabled to go down, but that fraction has gone up, again not for reasons of health but because of government social security programs. And so I have found with one initially plausible measure after another—all of them are too contaminated by other factors to reflect the output of the medical-care industry.

As noted earlier, the least bad measure that I have been able to come up with is length of life, though that too is seriously contaminated by other factors—improvements in diet, housing, clothing, and so on generated by greater affluence, better garbage collection and disposal, the provision of purer water, and other governmental public-health measures. Wars, epidemics, and natural and man-made disasters have played a part. Even more important, the quality of life is as meaningful as the length of life. Perhaps the extensive research on aging currently underway will lead to a better measure than length of life.

Figures 6 and 7 present two different sets of data on expected length of life: Figure 6, expected length of life at birth; Figure 7, remaining length of life at age 65. Both cover the whole century, from 1900 to 1997, the last year for which I was able to get data. For Figure 6 the data are annual; for Figure 7, decennial until recent years. The two tell very different, but equally remarkable, stories.

Expected longevity went from 47 years in 1900 to 68 years in 1950, a truly remarkable rise that proceeded at a fairly steady rate, averaging four-tenths of a year per year. Public-

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health activities, such as those leading to cleaner water and air and better control of epidemics, played a major role in lengthening life, no doubt; but so too did improvements in medical practice and hospital care, particularly those leading to a sharp reduction in infant and maternal mortality. Whatever its source, *the increase in longevity did not have any systematic relation to spending on medical care as a fraction of income.* We have reasonably accurate data on spending only from 1929 on; crude data from 1919 on. Except for the deep depression years of 1932 and 1933, national health spending never exceeded 5 percent of national income, and from 1919 to 1948, varied between 3 and 5 percent, primarily as a result of wider swings in national income than in health spending.

The most striking feature of Figure 6 is the sharp slowdown in the increase in longevity after 1950. From 1950 on, longevity grew at less than half the rate that it grew from 1900 to 1950—averaging less than two-tenths of a year per year compared to the earlier four-tenths.[6] In the first 50 years of the century, the life span increased by 21 years; in the next 47 years, by eight years. As in the first 50 years, the increase proceeded at a surprisingly steady pace. I have no good explanation for the shift from one trend to the other. I conjecture that it reflects the exhaustion by the end of World War II of the possibility of further major improvements from public-health activity. I leave it to scholars more knowledgeable about medicine than I to give a more satisfactory answer.

The later trend was accompanied, as the earlier one was not, by a major increase in spending as a fraction of national income. However, I attribute that increase in spending to the changes in the economic organization of medical care discussed earlier. I doubt that it is related as either cause or effect to the slowdown in the growth of longevity.

Data are much less readily available for longevity at age 65 than at birth, so I have resorted to the use of decennial estimates except for the most recent year. Figure 7 is almost the mirror image of Figure 6—that is, the same picture re-

[6] I have used data for the population as a whole, although data are also available by sex and race. There are minor differences between the sexes and between the races, but the broad picture is essentially the same for all, so I have not thought it worthwhile to present more detailed data, as I did in *Input and Output in Medical Care* (Stanford: Hoover Institution Press, 1992).

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versed. Instead of first rising rapidly and then slowly, longevity at age 65 at first rose slowly and then rapidly. Until 1940, longevity rose at an average of only .025 years per year. Remaining years of life went from 12—or to age 77—in 1900 to 13—or age 78—in 1940. Then there was a sharp acceleration, and in the next 57 years, remaining years of life went up by an additional five years to 18—or age 83, rising at the average rate of .085 years per year. Understandably, both the earlier and the later rates of growth in longevity at age 65 are much smaller than the comparable figures for longevity at birth. The remarkable phenomenon is the shift in trend around 1940, and the steadiness of the trend both before and after 1940.

Data for later years of life suggests that the steadiness of the trend in longevity at age 65 is not likely to continue. At these later ages, there has been a distinct slowing of increases in longevity since about 1980. At age 85, remaining years of life for females has not changed in the 17 years from 1980 to 1997. It was 6.4 years in both 1980 and 1997.[7]

What caused the change in the trend at age 65, and why was that change in the opposite direction from the change in the trend at birth, and why did it occur about 10 years earlier? Could it have been the emergence of penicillin and sulfa at around 1940 that explains the dating of the shift? No doubt many other advances in medicine, from the handling of blood pressure to the perfecting of open-heart surgery, the improved treatment of cancer, and the better understanding of diet were of special importance for preventing death at later ages. I am incompetent to judge these matters and their relative importance. But I have no doubt that one economic change also played an important role. That was the sharp improvement in the economic status of the elderly brought about by government transfer programs, notably Social Security. From being among the poorest groups in society, the elderly have become among the most affluent in the post-World War II period.

However interesting these speculations may be, they are a long way from providing an answer to the question with which we started this section, namely, "What have we gotten in return for quadrupling the share of the nation's income spent

[7] I am indebted to James Fries, a leading expert on aging, for calling this phenomenon to my attention. The data cited are from Metropolitan Life Insurance *Statistical Bulletin*, Oct.-Dec., 1998.

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on medical care?" The slowdown in the increase of longevity at birth started before tax exemption and Medicare had any effect on spending. Similarly, the acceleration in the increase in longevity at age 65 started 25 years before Medicare was enacted and showed no speedup thereafter. Perhaps better measures of the health of the population and various subgroups will show a relation to total spending. But on the evidence to date, it is hard to see that we have gotten much for that spending other than bureaucratization and widespread dissatisfaction with the economic organization of medical care.

VII. The United States vs. other countries

Our steady movement toward reliance on third-party payment no doubt explains the extraordinary rise in spending on medical care in the United States. However, other advanced countries also rely on third-party payment, many or most of them to an even greater extent than we do. What explains our higher level of spending?

I must confess that despite much thought and scouring of the literature, I have no satisfactory answer. One clue is my estimate that if the pre-World War II system had continued—that is, if tax exemption and Medicare and Medicaid had never been enacted—expenditures on medical care would have amounted to less than half its current level, which would have put us near the bottom of the OECD list rather than at the top.

In terms of holding down cost, one-payer directly administered government systems, such as exist in Canada and Great Britain, have a real advantage over our mixed system. As the direct purchaser of all or nearly all medical services, they are in a monopoly position in hiring physicians and can hold down their remuneration, so that physicians earn much less in those countries than in the United States. In addition, they can ration care more directly—at the cost of long waiting lists and much dissatisfaction.[8]

In addition, once the whole population is covered, there is little political incentive to increase spending on medical care. In an insightful analysis of political entrepreneurship, W. Allen

[8] See Cynthia Ramsay and Michael Walker, *Critical Issues Bulletin: Waiting Your Turn*, 7th edition (Vancouver, B.C., Canada: Fraser Institute, 1997).

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Wallis noted that

> one of the ways politicians compete for votes is by offering to have the government provide new services. For an offer of a new service to have substantial electoral impact, the service ordinarily must be one that a large number of voters is familiar with, and in fact already use. The most effective innovations for a political entrepreneur to offer, therefore, are those whose effect is to transfer from individuals to the government the costs of services which are already in existence, not to alter appreciably the amount of the service reaching the people.[9]

Medicare, Medicaid, the political stress on the "uninsured," and the current political pressure for government financing of prescriptions all exemplify this phenomenon. Once the bulk of costs have been taken over by government, as they have in most of the other OECD countries, the political entrepreneur has no additional groups to attract, and attention turns to holding down costs.

An additional factor is the tax treatment of private expenditures on medical care. In most countries, any private expenditure comes out of after-tax income. It does in the United States also, unless the medical care is provided by the employer. For this reason, the bulk of medical care is provided through employers, and private expenditures on medical care are decidedly higher than they would be if medical care, like food, clothing, and other consumer goods, had to be financed out of post-tax income. It is consistent with this view that Germany, the country second to the United States in the fraction of income spent on medical care, has a system in which the employer plays a central role in the provision of medical care and in which, so far as I have been able to determine, half of the cost comes out of pre-tax income, half out of post-tax income.

Our mixed system has many advantages in accessibility and quality of medical care, but it has produced a higher level of cost than would result from either wholly individual choice or wholly collective choice.

VIII. Medical savings accounts and beyond

The high cost and inequitable character of our medical-care system is the direct result of our steady movement to-

[9] W. Allen Wallis, *An Overgoverned Society* (Free Press, 1976), p. 256.

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ward reliance on third-party payment. A cure requires reversing course, reprivatizing medical care by eliminating most third-party payment, and restoring the role of insurance to providing protection against major medical catastrophes.

The ideal way to do that would be to reverse past actions: repeal the tax exemption of employer-provided medical care; terminate Medicare and Medicaid; deregulate most insurance; and restrict the role of the government, preferably state and local rather than federal, to financing care for the hard cases. However, the vested interests that have grown up around the existing system, and the tyranny of the status quo, clearly make that solution not feasible politically. Yet it is worth stating the ideal as a guide to judging whether proposed incremental changes are in the right direction.

Most changes made in the final decade of the twentieth century have been in the wrong direction. Despite rejection of the sweeping socialization of medicine proposed by Hillary Clinton, subsequent incremental changes have expanded the role of government, increased regulation of medical practice, and further constrained the terms of medical insurance, thereby raising its cost and increasing the fraction of individuals who choose or are forced to go without insurance.

There is one exception, which, though minor in current scope, is pregnant of future possibilities. The Kassebaum-Kennedy bill, passed in 1996 after lengthy and acrimonious debate, included a narrowly limited four-year pilot program authorizing medical savings accounts. A medical savings account enables individuals to deposit tax-free funds in an account usable only for medical expense, provided they have a high-deductible insurance policy that limits the maximum out-of-pocket expense. As noted earlier, it eliminates third-party payment except for major medical expenses and is thus a movement very much in the right direction. By extending tax exemption to all medical expenses whether paid by the employer or not, it eliminates the present bias in favor of employer-provided medical care. That too is a move in the right direction. However, the extension of tax exemption increases the bias in favor of medical care compared to other household expenditures. This effect would tend to increase the implicit government subsidy for medical care, which would be a step

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in the wrong direction.[10] But, on balance, given how large a fraction of current medical expenditures are exempt, it seems likely that the net effect of widely available and flexible medical savings accounts would be very much in the right direction.

However, the current pilot program is neither widely available nor flexible. The act limits the number of medical savings accounts to no more than 750,000 policies, available only to the self-employed who are uninsured and employees at firms with 50 or fewer employees. Moreover, the act specifies the precise terms of the medical savings account and the associated insurance. Finally, at the end of four years (the year 2000) Congress will have to vote to continue or change the program. (Those who signed up in the first four years would be entitled to continue their accounts even if Congress terminates the program.) A number of representatives and senators have indicated their intention to introduce bills to extend and widen the availability of medical savings accounts.

Prior to this pilot project, a number of large companies (e.g., Quaker Oats, Forbes, Golden Rule Insurance Co.) had offered their employees the choice of a medical savings account instead of the usual low-deductible employer-provided insurance policy. In each case, the employer purchased a high-deductible major medical insurance policy for the employee and deposited a stated sum, generally about half of the deductible, in a medical savings account for the employee. That sum could be used by the employee for medical care. Any part not used during the year was the property of the employee and had to be included in taxable income. Despite this loss of tax exemption, this alternative has generally been very popular with both employers and employees. It has reduced costs for the employer and empowered the employee, eliminating much third-party payment.

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[10] Whether medical savings accounts increase or decrease the government subsidy to medical care, including the hidden tax subsidy of tax exemption, depends on whether they raise or lower total medical expenditures exempted from tax. First-party payment works toward reducing such expenditures by giving consumers an incentive to economize and by reducing administrative costs. The availability of tax exemption to a wider class of medical expenses has the opposite effect. Such experience as we have with medical savings accounts or their equivalent suggests that the first effect is highly significant and is likely to overwhelm the second. However, this issue deserves more systematic investigation.

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Medical savings accounts offer one way to resolve the growing financial and administrative problems of Medicare and Medicaid. Each current participant could be given the alternative of continuing with present arrangements or receiving a high-deductible major medical insurance policy and a specified deposit in a medical savings account. New entrants would be required to accept the alternative. Many details would have to be worked out: the size of the deductible and the deposit in the medical savings account, the size of any co-payment, and whether additional medical spending would be tax-exempt. Yet it seems clear from private experience that a program along these lines would be less expensive and bureaucratic than the current system, and more satisfactory to the participants. In effect, it would be a way to voucherize Medicare and Medicaid. It would enable participants to spend their own money on themselves for routine medical care and medical problems, rather than having to go through HMOs and insurance companies, while at the same time providing protection against medical catastrophes.

An interesting and instructive experiment with medical savings accounts has recently taken place in South Africa, as explained by Shaun Matisonn of the National Center for Policy Analysis:

> For most of the last decade [the nineties]—under the leadership of Nelson Mandela—South Africa enjoyed what was probably the freest market for health insurance anywhere in the world....
>
> South Africa's insurance regulations were and are sufficiently flexible to allow the type of innovation and experimentation that American law stifles.... The result has been remarkable.... In just five years, MSA plans captured half the market, proving that they are popular and meet consumer needs as well as or better than rival products. South Africa's experience with MSAs shows that MSA holders save money, spending less on discretionary items in a way that does not increase the cost of inpatient care. Contrary to allegations by some critics, the South African experience also shows that MSAs attract individuals of all different ages and different degrees of health.

A more radical reform would, first, end both Medicare and Medicaid, at least for new entrants, and replace them by providing every family in the United States with catastrophic insurance—i.e., a major medical policy with a high deductible.

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Second, it would end tax exemption of employer-provided medical care. And third, it would remove the restrictive regulations that are now imposed on medical insurance—hard to justify with universal catastrophic insurance.

This reform would solve the problem of the currently medically uninsured, eliminate most of the bureaucratic structure, free medical practitioners from an increasingly heavy burden of paperwork and regulation, and lead many employers and employees to convert employer-provided medical care into a higher cash wage. The taxpayer would save money because total government costs would plummet. The family would be relieved of one of its major concerns—the possibility of being impoverished by a major medical catastrophe—and most could readily finance the remaining medical costs. Families would once again have an incentive to monitor the providers of medical care and to establish the kind of personal relations with them that were once customary. The demonstrated efficiency of private enterprise would have a chance to improve the quality and lower the cost of medical care. The first question asked of a patient entering a hospital might once again become "What's wrong?" and not "What's your insurance?"

While so radical a reform is almost surely not politically feasible at the moment, it may become so as dissatisfaction with the current arrangements continue to grow. And again, it gives a standard—if less than an ideal one—against which to judge incremental changes.

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APPENDIX

Figure 1
Medical Care Spending as Percent of GDP and
Expected Length of Life at Birth for Females
(29 OECD Countries, 1996)

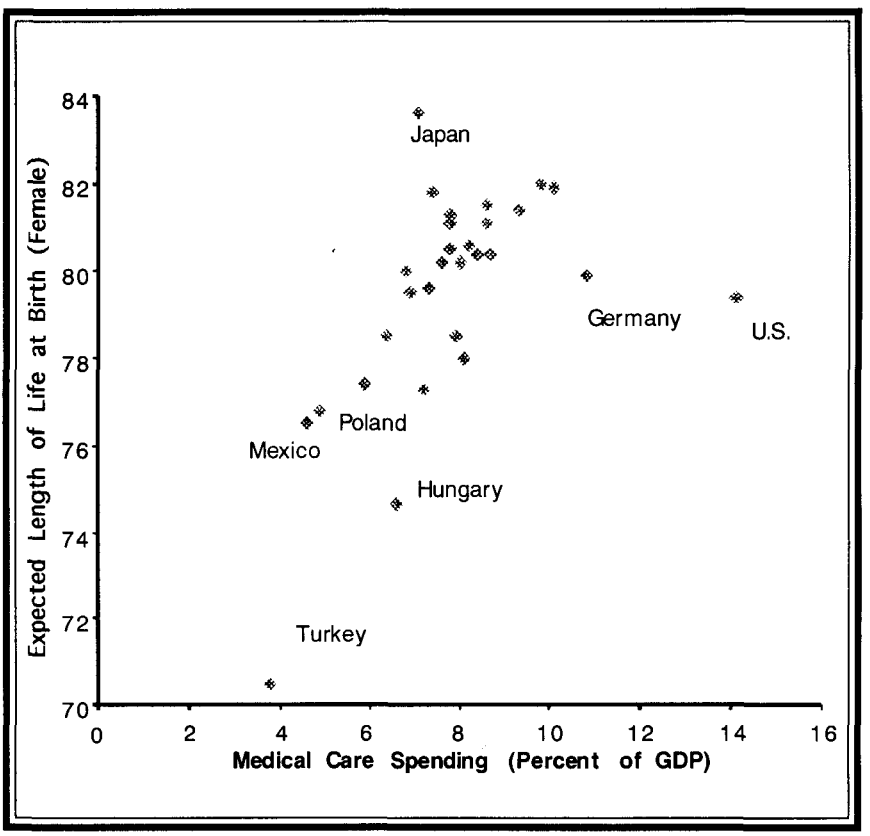

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Figure 2
Per Capita Spending on Medical Care, U.S.
1919-1997
(constant 1992 dollars)

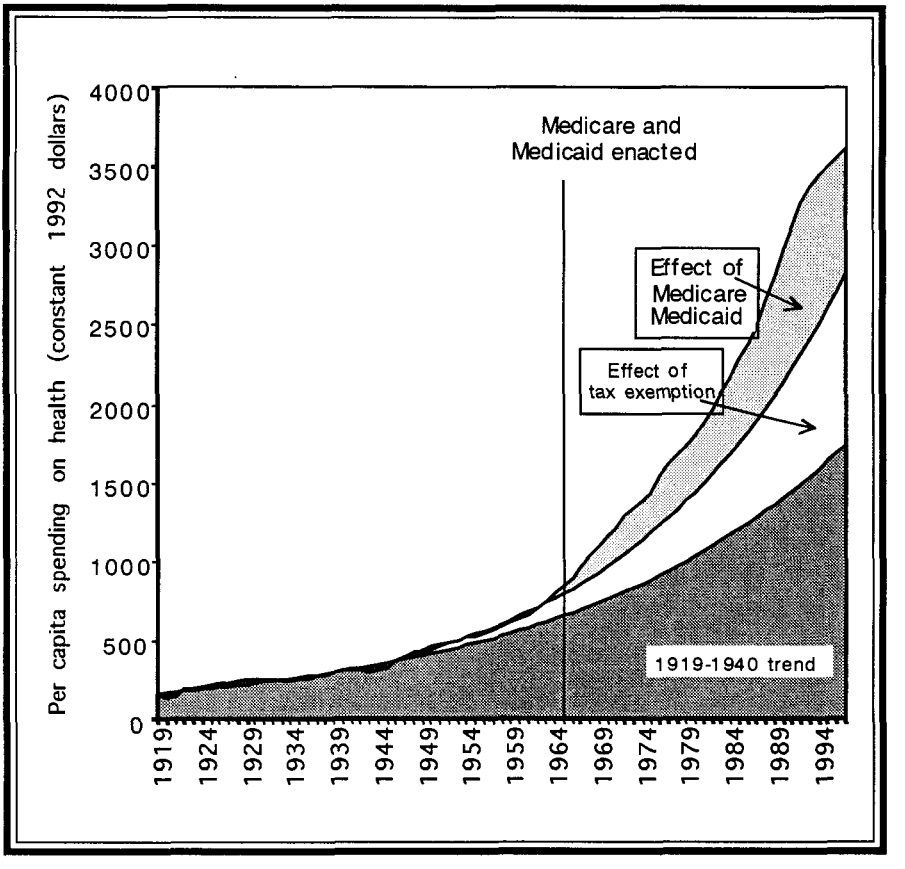

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Figure 3
Private and Government Expenditure on Health as
Percentage of National Income
1919-1997

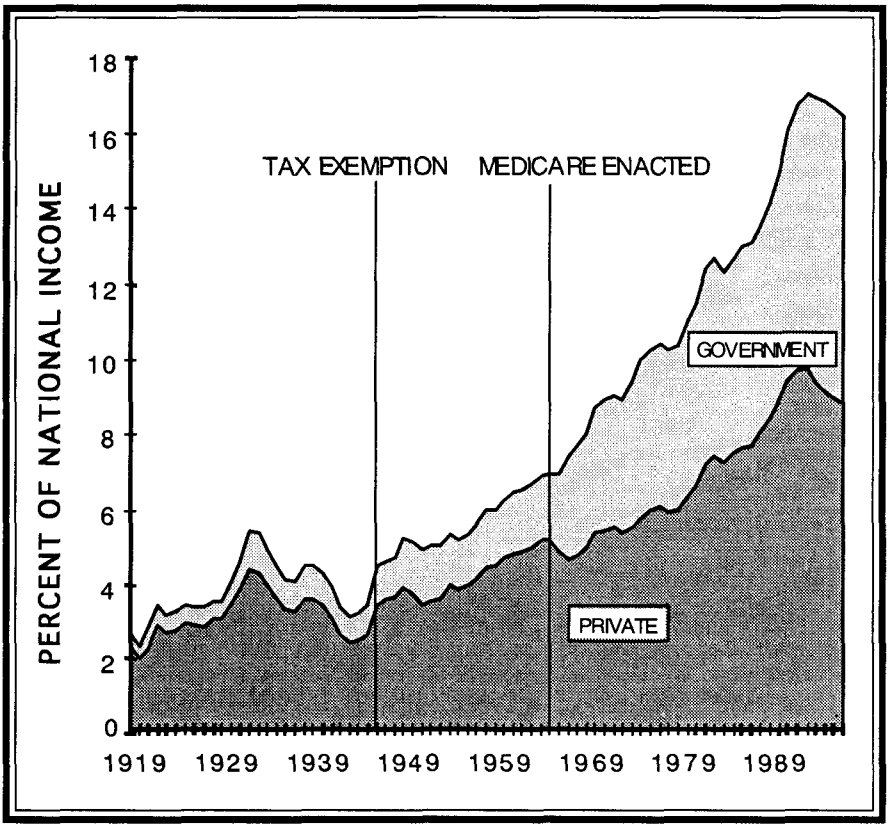

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Figure 4
U.S. Hospitals: Input vs. Output
1946-1996

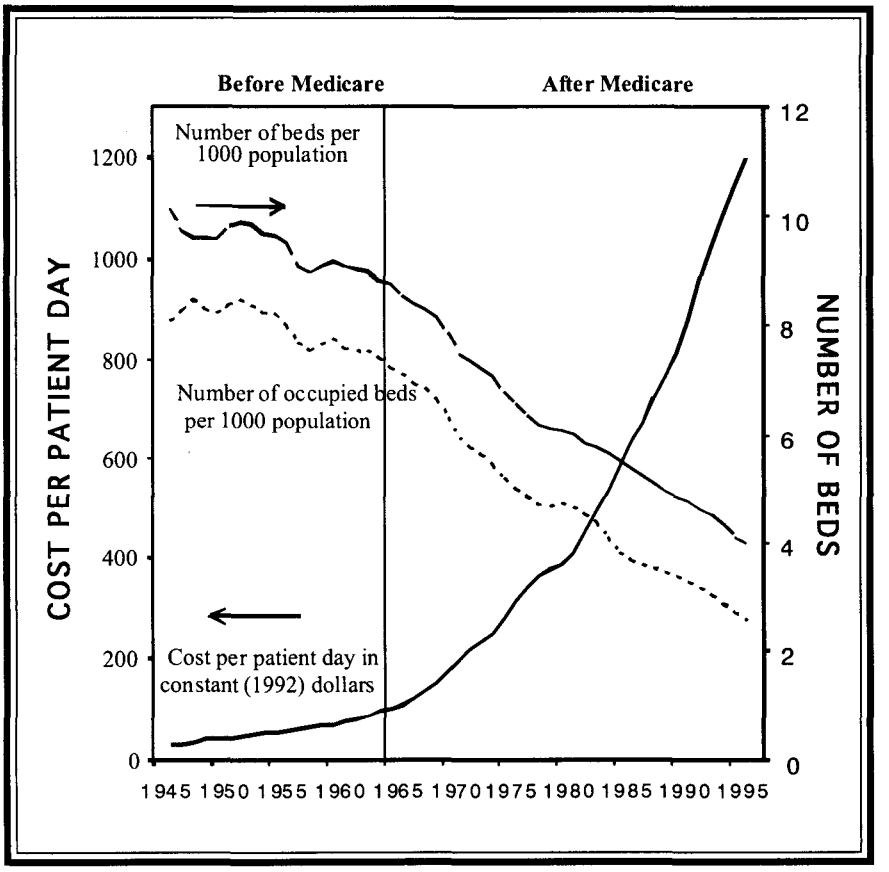

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Table 1

Summary of Data on Medical Input and Output
1945, 1965, 1996 or 1997

Note: All dollar figures in 1992 dollars to correct for inflation

	1946	1965	1996	1996/1946
Hospitals				
Beds per 1,000 population	10.2	8.8	4	**0.4**
Percentage of beds occupied	80	82	65	**0.8**
Personnel per 100 beds	73	139	624	**9**
Cost per patient day	$30	$101	$1,200	**40**
Hospital cost per capita	$89	$267	$1,129	**13**
Other medical cost per capita	$280	$583	$2,434	**9**
Total medical cost per capita	$369	$850	$3,563	**10**
Hospital cost, percentage of total	24	31	32	
Hospital days per person per year	3.0	2.7	0.9	**0.3**
	1946	**1965**	**1997**	**1997/1946**
Health expenditures				
Private per capita	$286	$637	$1,943	**7**
Gov't per capita	$83	$212	$1,683	**20**
Total per capita	$369	$850	$3,626	**10**
Research per capita	$3	$30	$58	**19**
	1946	**1965**	**1996**	**1996/1946**
Physicians*				
Cost of physician services per capita	$110	$128	$415	**4**
Number per 100,000 pop.	134	153	250	**2**
Mean net income	$65,495	$132,168	$181,422	**3**
	1950	**1965**	**1997**	**1997/1950**
Mortality, total population				
Life expectancy at birth	68.2	70.8	76.4	**1.12**
Life expectancy at age 65	13.83	15.00	17.70	**1.28**

* These numbers, all derived from U.S. government data, are internally inconsistent. For 1965 and 1996, the product of the number of physicians and the mean net income per physician gives a per capita cost that is higher than the reported cost of physician services, even though it excludes the costs of physician services other than the physician's income.

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Figure 5
Number of Physicians per 100,000 Population and Mean Income of Physicians, Corrected for Inflation (1992 dollars), Decennially, 1930-1990, and 1996

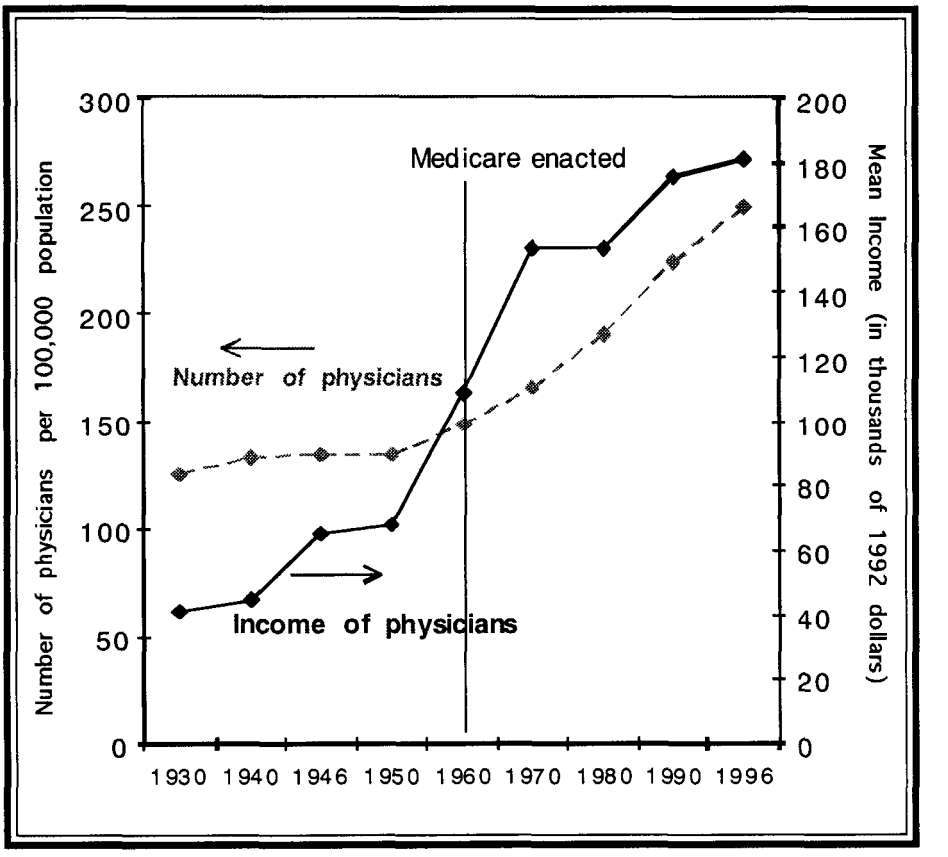

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Figure 6
Life Expectancy at Birth; U.S. Population; 1900-1997, and Linear Trends fitted to 1900-1940 and 1950-1997

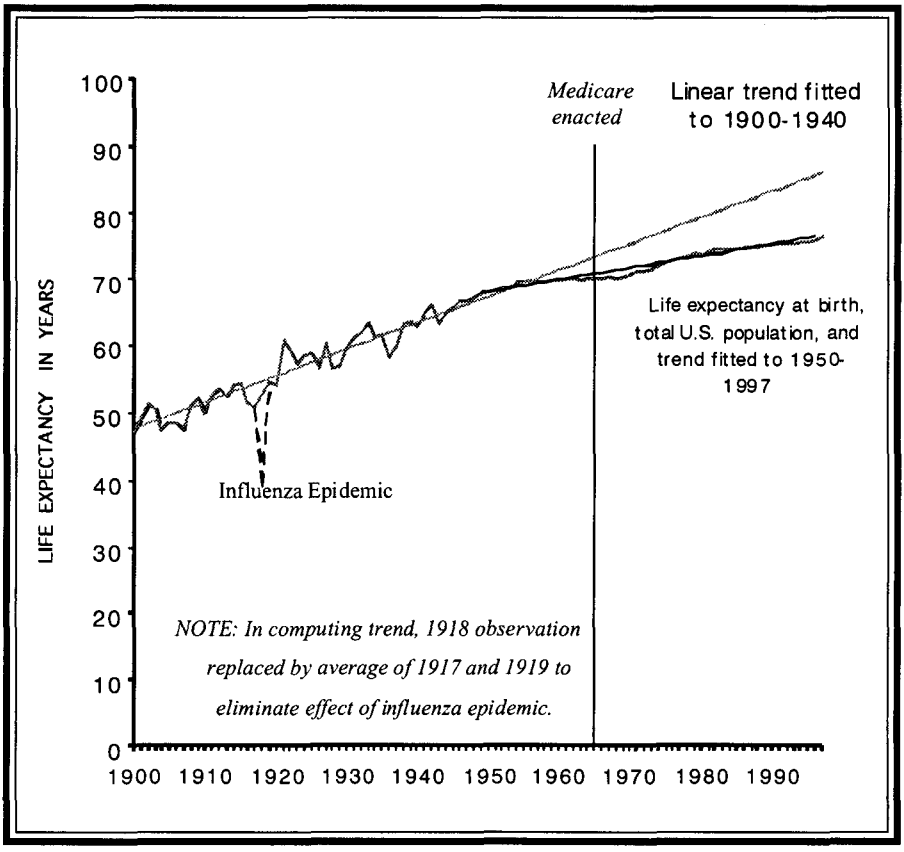

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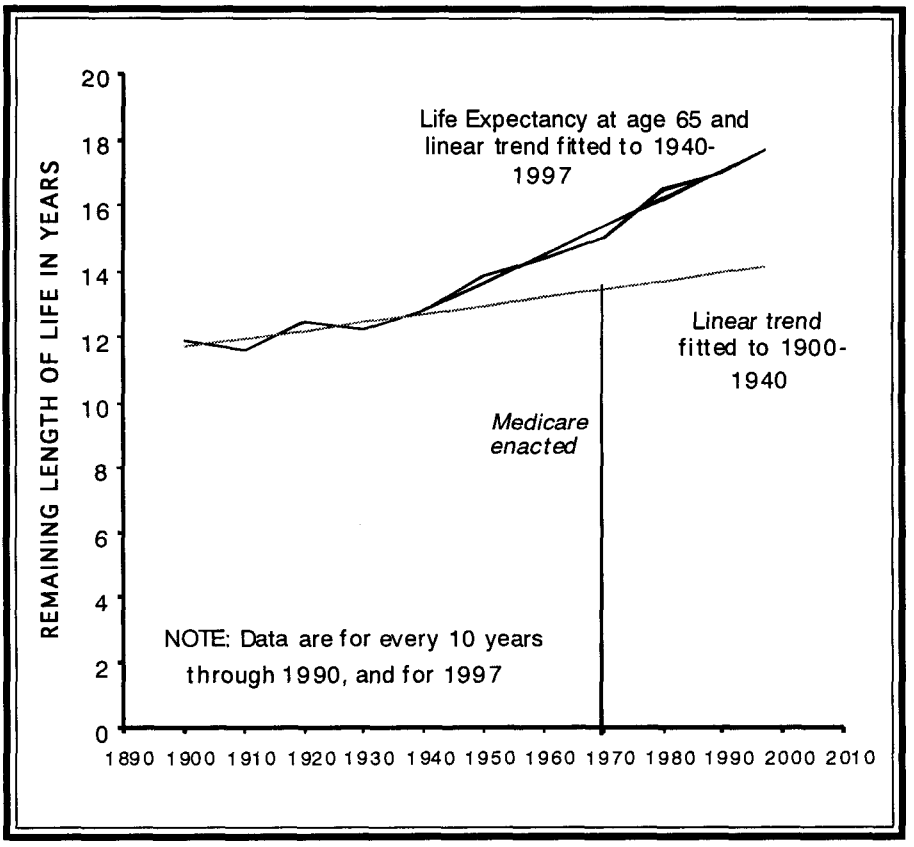
Figure 7
Life Expectancy at Age 65, Total U.S. Population, 1900-1997, and Linear Trends fitted to 1900-1940 and 1940-1997



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Politics in a Brave New World

ADAM WOLFSON

BY all accounts, we are on the cusp of a great technological revolution or revolutions. In the last several months, *Time*, *Newsweek*, *Wired*, the *New York Times Magazine*, even the stuffy, high-brow *Partisan Review* have run cover stories on the technological marvels about to transform our lives. None of this apparently is science fiction but what leading scientists in their respective fields are predicting as fact. Some of the changes will be of the James Bond variety, like auto-piloted cars and nonlethal phaser guns. Other inventions will have broader effects: New virtual-reality games and the Internet will complete a process that TV inaugurated, the metamorphosis of our civilization into one increasingly driven by images and sentiment rather than words and thought. And other changes in the offing will be even more dramatic, going to the very heart of what it means to be a human being. Discoveries just over the immediate horizon in human genetics and computers threaten (or promise, depending upon your perspective) to usher in, as strange as it

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may sound, a "posthuman" era.

As or even more interesting than the foretold scientific breakthroughs, however, is our collective reaction to them. Generally, the American public is quiescent, when it is not celebratory, and many leading liberal and conservative intellectuals seem relatively untroubled. Gone apparently are the days when conservatives and liberals both worried about the dangers of the Machine. A half century ago, Richard Weaver, a revered and iconic figure on the American Right, famously denounced "the gods of mass and speed" in his conservative classic *Ideas Have Consequences*. And one need only mention such a stalwart of the Left as Herbert Marcuse, who in his sixties manifesto, *One-Dimensional Man*, attacked "technological rationality" as "the great vehicle of better domination, creating a truly totalitarian universe," to remember that liberals once cast a cold eye toward technology. As literary critic Leo Marx has shown, censure of technology has had a long and venerable history in America, stretching from Thomas Jefferson and Nathaniel Hawthorne to F. Scott Fitzgerald and the 1960s counterculture.

"Somewhere along the way, however [as the editors of the *New York Times Magazine* recently wrote approvingly], all that doom and gloom drifted out to sea, pushed away not by blue-sky idealism but by a temperate, practical faith in the idea that machines are nothing to be afraid of, that we can use them when, where and how we want to use them and that technology might actually improve our lives." Indeed, there can be no more definitive measure of our embrace of technology than our reaction to advances in the field of genetic engineering, where the possibilities are truly consequential. Lee M. Silver, a molecular biologist and neuroscientist at Princeton University, predicts that by mid century genetic engineering will have become sufficiently feasible, safe, and efficient that we will possess "the power to change the nature of humankind." And the founder of sociobiology, Harvard professor Edward O. Wilson, estimates that within a few decades, we will enter an era of "volitional evolution," having gained the ability to "alter not just the anatomy and intelligence of the species but also the emotions and creative drive that compose the very core of human nature." If anything should occasion intro-

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spection and pause, if not doom and gloom, surely this is it. Yet even when the stakes could not be higher, when we are about to embark on the (re)creation of man, liberalism and conservatism seem to have put out the welcome mat. It is worth asking why.

Liberals

As it happens, there is a critical liberal response to technology's encroachment on human life, and it has been convincingly made by William A. Galston, a former advisor in the Clinton administration and the author of *Liberal Purposes*. In Galston's view, we intuitively sense that modern technology can, on the one hand, supplement or complete human nature, and on the other hand, violate it. Reading machines for the blind would be an example of the former, a technology that allows the disabled to lead more fully human lives; while medical technologies that prolong dying and suffering detract from human dignity by riding roughshod over natural limits. Galston himself contrasts a proper, liberal use of genetic treatment—which would, for example, seek "to nip Down's syndrome in the bud, that is, to eliminate natural defects in a manner that safeguards the life of the fetus"—with an illiberal form of genetic engineering that would favor certain traits over others or even introduce new traits into the species. The question is whether liberalism has within itself the resources and depths to ground such distinctions. Galston contends that, at least in theory, a neo-Kantian understanding of human freedom does—that it can "help draw the line between technology supportive of our dignity and technology that erodes dignity by treating us as means alone."

Galston perhaps shows that liberalism, properly understood, can help guide us through the technological thicket. But as he acknowledges, political philosophies in the real world are rarely properly understood, much less properly practiced. I would point out that the collapse of liberalism's standard against obscenity, culminating in the Supreme Court's declaration in 1971 that "one man's vulgarity is another man's lyric," does not inspire optimism. Liberals who cannot tell the difference between art and obscenity are not likely to rise to the more difficult challenge of differentiating technologies that fulfill

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our nature from those that destroy it.

And in fact the liberal theorist Ronald Dworkin argues not simply that liberalism is neutral on the question of genetic engineering but that it welcomes it. The author of numerous books in legal and political theory, and an important influence on the Supreme Court, Dworkin is, without exaggeration, the leading voice of elite liberal opinion in America. In his latest book, *Sovereign Virtue*, Dworkin derives a eugenic imperative out of liberalism's principles of equality and autonomy. Regarding the equality principle, Dworkin argues "that it is objectively important that any human life, once begun, succeed rather than fail—that the potential of that life be realized rather than wasted—and that this is equally objectively important in the case of each human life." And regarding liberalism's principle of autonomy, Dworkin holds that a person "has a right to make the fundamental decisions that define, for him, what a successful life would be." Taken together, these two liberal principles mandate, in Dworkin's view, a new eugenics.

The first principle—that a life once begun be successful—requires, according to Dworkin, a regime of genetic testing, perhaps even mandatory testing. For if it becomes possible to test for and correct genetic defects in embryo, then our concern for equality, our concern that each life be successful, necessitates that we do all we can to prevent genetically linked diseases. The liberal principles of equality and autonomy also justify, in Dworkin's hands, the more radical program of genetically reengineering the species—of deciding, in Dworkin's blunt words, "which kind of people, produced in which way, there are to be." Here's his reason why: The equality principle "commands" that we make every life a successful one, and thus genetically enhanced IQs and the like, once feasible, are morally required. The autonomy principle meanwhile "forbids" "hobbling the scientists and doctors who volunteer to lead" the new eugenics, for we are not permitted to interfere with the scientist's or any individual's autonomy. If the scientist believes it his mission to transform the human species, we must respect his autonomy, and allow him to proceed.

It might at first seem shocking that a prominent liberal would take this position. What's being defended is a eugenic program to weed out "unsuccessful" human life—a program to

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be led by an elite corps of scientists accountable to no one but themselves. Yet on reflection we should perhaps not be surprised that liberalism can be interpreted (or misinterpreted) in this way: The Left's belief in Progress leads it to seek the "improvement" of the human race, whether by education or therapy or psychotropic drugs or ... eugenics. Its devotion to absolute human equality tempts it to achieve this elusive goal if not by social engineering then by genetic engineering. Its espousal of radical autonomy leaves no standard by which the choices of scientists can be questioned, much less circumscribed. And more broadly, its concept of state neutrality regarding human ends (i.e., "lifestyle" choices) prepares the way for a state that is also neutral regarding the (technological) means chosen to reach those ends. Finally, modern liberalism's inveterate hostility toward religion (except Senator Joe Lieberman, of course) goads it, in Dworkin's words, to "play God," "because the alternative is cowardice in the face of the unknown."

Conservatives

The case of conservative opinion and the new technologies, eugenics in particular, is not so clear-cut. Religious conservatives, of course, have strongly resisted fetal-tissue research as well as other biotech developments. Meanwhile, social conservatives have put forward powerful and convincing critiques of the new eugenics, and of these none stands out more than Leon Kass's. In Kass's neo-Aristotelian view, the problem with modern science, notwithstanding its success in explaining how things work, is its failure to say anything about human ends or the good for man. Thus Kass has sought, in his own words, "a more natural and richer biology and anthropology, one that does justice to our lived experience of ourselves as psychophysical unities—enlivened, purposive, and open to and in converse with the larger world." His argument is that only by understanding human ends as they are revealed in our "given nature" will we come to see the violation of genetic engineering. Kass has leveled one of the most trenchant philosophic challenges in recent years to the new technologies. Yet it is probably fair to say that he is not representative of modern conservative opinion, and so one must look elsewhere for the

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popular conservative take on technology.

Modern conservatism is characterized by its denunciation of Big Government and its cry of "leave us alone." It is this libertarian view that guides most conservative politicians and policy makers as well as grass-root conservatives. Behind these popular slogans lies a sophisticated theory of the nature of society and the limits of human understanding, a theory developed by F.A. Hayek, who has had an enormous influence on American conservatism. On balance, Hayek's philosophy probably contributes to conservatives' acceptance of the new eugenics, but not without raising important questions along the way.

According to Hayek, society is a "grown" or "spontaneous order," as opposed to a "made" order. By this, Hayek meant that society comes into being and functions without conscious design, and that neither society's origins nor its operations can be comprehended by the human mind. The effort to do so, to construct the ideal social order or the planned economy—an effort that led in the last century to untold suffering and catastrophe—Hayek attributed to the philosophies of Descartes, Bacon, Comte, and Marx. He gave a special name to this new mode—"constructive rationalism"—but he was not the only conservative thinker to be critical of its effects. From Burke to Michael Oakeshott to Milton Friedman runs a critique of the modern rationalist conceit of building utopia.

So where might the Hayekian understanding of social formation and the limits of the human understanding lead on the question of the new eugenics? Well, consider for a moment the buzzwords commonly associated with the new eugenics: We are told that our scientists have discovered human nature's "blue print" or its "operating manual"; that our molecular biologists will be able to replace slow, blind evolution with rational control; that they will be able to "custom design" human beings; that they will become the creators of a new race of men; that they will indeed play God. This is the "constructive rationalist" enterprise par excellence! And not incidentally, it received its first impetus from those godfathers of modern science Bacon and Descartes, precisely the philosophers Hayek singled out for opprobrium. Yet if one were to suppose that all this talk of human design, rational planning,

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scientific expertise, and progress and perfection has led contemporary conservatives to reject the new eugenics one would be wrong. The libertarian magazine *Reason* and the more traditionally conservative *National Review* have both run articles endorsing the new eugenics. And while Charles Murray, the author of *The Bell Curve* and a primer on libertarianism, has strongly criticized a left-wing brand of eugenics, whereby the government implements eugenic programs to improve the IQ of poor children, he has endorsed voluntary genetic manipulations aimed at improving overall physical and mental abilities.

The conservative embrace of the rationalist project of Bacon might be explained by the fact that Hayek and other libertarian thinkers were concerned with the evils of *social* planning, not *biological* planning. It is perhaps the rationalist approach applied to society and politics only that is condemned by them. However, it's not clear that the two are easily separated, for in Hayek's view, the human organism, like society, is a "spontaneous order" (though of a more concrete kind). I would raise then the possibility that some of the strictures Hayek leveled against social planning could equally apply to the case of genetic engineering, though the last word on this must go to Hayek scholars. On a more practical and telling level, the two cannot be separated since the application of "constructive rationalism" in one sphere, genetics, will have, as all acknowledge, far-reaching political and social consequences. What these will be is anyone's guess, but one way or another, rational control and manipulation of the genetic blue print will bring about the triumph of Rationalism in politics.

Libertarians all

This is not to say, however, that modern conservative ideology stands against genetic engineering. Clearly it does not. One reason is its guiding principle of individualism—that individuals are best situated to make choices that concern their well-being. Just as the concept of the "spontaneous order" rules out social planning, so too it rejects the possibility of transcendent moral standards. Values and standards are said to be subjective, and therefore, within certain limits, individuals are to be free to pursue their preferences. And so contemporary conservatives reject government-directed eugenic pro-

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grams (in contrast to Dworkin), but they are perfectly happy with voluntary eugenics. They defend the new eugenics almost on the same ground the Left defends abortion: as a private choice to be made by individuals.

A recent roundtable discussion among several scientists and professors, published in *Prospect* magazine, wonderfully illustrates this prevalent libertarian mindset. James D. Watson, co-discoverer of DNA's structure and one of the Human Genome Project's key leaders, was asked whether he would set any limits on a form of negative eugenics, in which women have abortions for genetic reasons. "No limits. Parents should decide," he replied. When pressed by Nancy Cartwright, a professor at the London School of Economics, about creating formal mechanisms for making such decisions, he was no less adamant. The exchange went like this:

> JW: Do you want a committee of wise women like yourself telling other women what to do? You want a pseudo-consensus which, in practice, takes the decision away from individual parents.
> NC: I want a serious study and a serious public discussion.
> JW: You mean: more social science crap.

The libertarian argument that genetic engineering is acceptable so long as it is freely chosen by individuals is fraught with difficulties, however. Once genetic engineering is offered on a voluntary basis (and let's not forget that government funding has played a role in its development and thus its eventual availability), social coercion at least will come into play. Already the medical establishment pressures prospective parents to test for genetic abnormalities in the developing fetus. Conservatives should also keep in mind that liberals will demand government-funded eugenics for the economically disadvantaged. It is naive to think that if the Ivy-educated begin widely to practice eugenics, the government will not make it available to the less well-off too. Another difficulty is that individuals will not easily exercise informed, independent choices when it comes to eugenics. They will almost always need the advice of highly trained experts, and as a result their "freedom of choice" will be more form than reality. Yet because modern conservatism has been framed mainly in terms of individual freedom and opposition to Big Government, efforts to establish public standards, whether in the matter of

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obscenity or now eugenics, are reflexively opposed. And so it happens that though they get there by different routes, conservatives and liberals both end up supporting genetic engineering.

Technopolis

Our inability to resist the new technologies goes beyond inadequacies in our liberal and conservative public philosophies. More broadly, our mental architecture has become furnished with technological notions and metaphors. Not long ago the editors of the *New York Times* advised: "We need to remember that the measure of a civilization is not the tools it owns but the use it makes of them." Well, of course. But one must also keep in mind that technology is more than a mere tool; it inevitably shapes our world, regardless of whether we use it wisely. Which is to say that the new eugenics seem palatable to us because technology has already profoundly affected our self-understanding. A few examples will illustrate the point.

In his elegant book *The Muse in the Machine: Computerizing the Poetry of Human Thought*, Yale computer scientist David Gelernter takes up the question of whether we will succeed in building computers that think. To assess the feasibility of *artificial* intelligence, Gelernter explains, *human* intelligence must first be defined. According to him, intelligence occurs along a spectrum: "High-focus" thought preeminently involves the manipulation of abstractions—it is, Gelernter notes, "the supreme and defining achievement of the modern mind." But abstract thought is not the whole of human thought, which also occurs at the "low-focus" level of the spectrum—found in the Bible, for example—where it is rich in symbolism, compound imagery, and counterintuitive connections. To be sure, modern, high-spectrum thought is deeper than low-spectrum thought. But it is also, Gelernter holds, narrower: "Outfitted as they are with modern minds and habits of thought, our own thinkers and philosophers are *simply unable to see* what ancient man saw."

With the full spectrum of human thought in view, one can judge scientists' hopes of constructing thinking computers—computers capable of not only high-spectrum calculations but low-spectrum visions. We will never build such computers, in

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Gelernter's opinion. But we will declare victory anyway, by redefining human intelligence exclusively in terms of its computer-like, high-spectrum qualities. Intelligent machines will seemingly become possible only because we have first recharacterized the human mind as a machine; computerized it and thus diminished it. In Gelernter's words: "We are not so much breaking machines to our will as rushing into their arms."

In our rush to embrace the new eugenics comparable confusions reign. We are unable to raise objections to it because our view of man is already saturated with technological categories of thought. One of the most commonly made arguments for allowing parents to increase the IQ of their children genetically is that parents already spend hundreds of thousands of dollars on education to accomplish the same goal. Thus why not allow them to reach this result more cheaply and assuredly through genetic enhancement of their children in embryo?

Formulated as such, the question answers itself. Of course parents should have this "right." But embedded in this question is a very modern, strange notion of the purpose of education: to increase IQ. Traditionally, education was not thought of in such limited, technocratic terms. To be sure, parents expected their children to learn the basics—reading, writing, math, and science. But education was thought to be much more: It was education to become a good citizen and a good man; it was about the inculcation of virtue. It was about shaping human souls, not raising test scores. If we had not lost sight of what education was properly for, if we had not come to think of it as expanding memory banks and enhancing processing speeds, we would not be open to accepting genetic engineering as a legitimate educational tool. So let's not fool ourselves: A sentiment less generous than education of the young drives the ambition to engineer smarter, cleverer beings. It is the desire for an even more complete mastery over nature.

Consider another frequently heard argument on behalf of the new eugenics. It is said that we should allow couples to select for certain desirable traits in their children, like height or blue eyes, because humans from time immemorial have practiced a crude form of eugenics every time they mated.

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The woman who falls for Prince Charming, or the man who courts a woman with a voluptuous figure, is said to be really seeking to produce attractive, healthy offspring. The advantage of genetic engineering is that it guarantees the result. But as James Joyce memorably put it, in *A Portrait of the Artist as a Young Man*, this view "tells you that you admired the great flanks of Venus because you felt that she would bear you burly offspring and admired her great breasts because you felt that she would give good milk to her children and yours." It is by such crude reductionism that we first come around to the scientist's dream of creating a superior race.

And strangely, we don't even recognize the danger. When the mapping of the human genome was completed last spring, President Clinton took it as proof positive that all humans were created equal after all:

> I believe one of the great truths to emerge from this triumphant expedition inside the human genome is that in genetic terms all human beings, regardless of race, are more than 99.9 percent the same. What that means is that modern science has confirmed what we first learned from the ancient faiths. The most important fact of life on this earth is our common humanity.

And what, one might ask, is to be made of the 0.1 percent that is not the same, that is not equal? Clinton's error, widely shared by the public, is that the principle of equality needs modern science's support. But long before modern genetics or Mendel or Darwin, the American Founders declared equality a "self-evident" truth. To them, this was a political, not a biological, truth. It was also a self-evident truth, which did not require a deep biological investigation of the human genome to be known. Rather, it could be known by all Americans, not just those trained in the abstruse science of genetics. In his appeal to modern science, Clinton may think he is bolstering our "ancient faith" in equality, but he has in fact weakened it severely. He has made a self-evident moral and political truth contingent upon what the scientists happen to come up with in their laboratories.

Human being and citizen

No discussion of technology in America would be complete without mention of Martin Heidegger, though this is a subject

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to which I can hardly do justice. In his magnificent book *Reconstructing America*, James W. Ceaser describes the powerful influence Heidegger's philosophy has had on how we think about our country and technology. As Ceaser summarizes Heidegger's philosophy, the modern age represents technology's final triumph, and America technology's ultimate symbol. The importance Heidegger assigned to technology can be seen, as Ceaser shows, in that he did not analyze the different political regimes by their forms of government or principles of justice; instead, he asked which ones could spark a genuine confrontation with technology. In this reductive analysis, Nazi Germany, the Soviet Union, and America's liberal democracy were all one and the same, all embodying the catastrophe of technology. None could adequately confront technology because all were products of technology. So extreme was Heidegger's analysis that he notoriously claimed that "as for its essence, modern mechanized agriculture is the same thing as the production of dead bodies in gas chambers and extermination camps."

The falsity (and wickedness) of this claim should be obvious enough, but it illustrates the pitfalls that await any attempt to appraise technology's impact on America. There will always be the temptation to exaggerate technology's influence, to view our society, as Heidegger did, as some sort of techno-monstrosity. But there is another temptation: to view America as a grand techno-amusement park, and objections to this or that new invention as instances of Ludditism or un-Americanism. In this distorted view, as in Heidegger's, America's democratic form of government and liberal ideals as well as its Judeo-Christian heritage are just so much background noise to its true essence: Technological Innovation.

What's needed is a deeper understanding of the relation between technology and the principles of liberal democracy. To some extent one is not possible without the other. Could we have had Locke without Bacon? The former's ideals of equality and freedom without the latter's quest to master nature for the relief of man's estate? The very Constitution that secures our rights and liberties and establishes our democracy also empowers Congress "to promote the Progress of Science and useful Arts." And yet, if the political and scientific projects

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are inseparable from one another, they are not necessarily of equal rank and dignity.

Of all the Founding Fathers, Benjamin Franklin most embodied the spirit of scientific progress. In *The Autobiography*, he proudly recounts his invention of a new stove and enthusiastically declares this the "age of experiments." Yet one can find even in Franklin, discoverer and inventor, an awareness that science should not be a self-justifying pursuit. "There is," Franklin once counseled an aspiring student, "a prudent Moderation to be used in Studies of this Kind [natural science]." And Franklin continued: "If to attain an Eminence in that, we neglect the Knowledge and Practice of essential Duties, we deserve Reprehension. For there is no Rank in Natural Knowledge of equal Dignity and Importance with that of being a good Parent, a good Child, a good Husband or Wife, a good Neighbour or Friend, a good Subject or Citizen." Here is a promising opening for discussing and evaluating the new technologies, one that is tainted by neither Ludditism nor nihilism. It balances the benefits of science and technology against the experience of our humanity in its most fundamental relations of parent, spouse, friend, and citizen. At least it's a start.

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Does federalism have a future?

PIETRO S. NIVOLA

THE current consensus among savants of American federalism is that, at long last, power is shifting back to the states. The Cold War, which gave Washington politicians a national-security pretext for immersing themselves in local tasks like building bridges and highways, is history. Republican majorities, reputedly solicitous of state sovereignty, have controlled Congress since 1995. They promptly enacted legislation that would supposedly kick the congressional habit of heaping expensive obligations on state and local governments but not appropriating the money to help them comply. A year later, Congress also put the states in charge of handling more of the national welfare program. The Clinton administration not only signed off on this devolution but granted state agencies a degree of discretion in administering Medicaid and in managing some aspects of U.S. environmental policy. Much of the energy stirring public policy these days—from school reform to the reprise of prohibitionism (this time targeting tobacco)—seems to emanate from the statehouses. Per-

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haps most notably, during the past few years the Supreme Court has handed down several opinions that have sought to shore up prerogatives of the states. (Soon there may be a few more of these opinions: In the coming year, the Court will decide whether states can be sued in federal court for alleged job discrimination against persons with disabilities and whether the Army Corps of Engineers can prevent a state from building a landfill that might upset the habitats of some migratory birds.)

However interesting these developments are, their importance is nevertheless being exaggerated. Editorial writers and op-ed commentators seemed inconsolably frightened, for instance, by the Supreme Court's affirmations of states' rights—which made "a kind of fetish out of state sovereign immunity," opined one in the *Washington Post*, or even harked back to "racist precedents of the 1880s," declaimed another in the *New York Times*. In truth, neither the recent body of court decisions nor of legislative initiatives will restore the decentralized federal system that prevailed in this country prior to the latter half of the twentieth century. A bigger, or at least more invasive, central government has been the dominant trend for decades. And signs today (including the latest Republican and Democratic party platforms, neither of which would abolish a single federal agency) augur anything but a radical reversal.

Federal preemptions

In 1908 Woodrow Wilson observed that the proper relationship between the national government and the states "is the cardinal question of our constitutional system." The question would not be settled by "one generation," he added, but would preoccupy "every successive stage of our political and economic development." The latest round of this enduring debate grapples with the propensity of federal authorities to "preempt" state laws. A glimpse at this controversy is worthwhile, not least because it suggests that the contemporary dissent against federal dominance is by no means steadily gaining traction.

The ink was barely dry on the devolutionary measures of the mid 1990s when state and local officials noticed that their

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policies were still being displaced by new prescriptions and prohibitions stipulated by federal lawmakers or bureaucrats. Concern over a profusion of such so-called preemptions was duly aired in congressional hearings in 1999, but to no avail. Correctives—such as those in a proposed Federalism Accountability Act authored by Tennessee senator Fred Thompson—were advanced but eventually withdrawn.

The short answer to why projects like Senator Thompson's fizzled is that corporations presently fear aggressive regulators and tax collectors in the state legislatures and bureaucracies even more than the divided, hence suitably gridlocked, governing institutions at the federal level. These business interests now look to preemptive acts of Congress not just to set baselines (floors) below which state policies must not fall but to secure compulsory *ceilings* on the possible excesses of zealous states. Perceived as disabling this type of legislated constraint on local zealotry, the Thompson bill was zapped by an eleventh-hour corporate lobbying blitz.

And there were other complications. Challenging the ability to preempt ultimately meant questioning multiple forms of federal leverage over the states. The kinds of illustrations offered at hearings before the Senate Committee on Governmental Affairs in July 1999 included more than the much-reviled Internet Tax Freedom Act, which imposes a moratorium on state taxation of Internet retail transactions, and a few other unvarnished injunctions on states and localities. Also on the list of examples were new requirements accompanying federal grants-in-aid and instances of what policy makers a few years earlier had characterized as unfunded mandates: that is, new federal commandments that foisted unwanted financial liabilities on the states.

Measures preempting the states, it appeared, covered a considerable assortment of federal encroachments. There seems to be little perceptible difference between a preemption and, say, a binding national standard, or an inadequately funded mandate, or a restrictive condition tied to federal aid that the states cannot do without. What continued to rankle many governors, mayors, and other proponents of local flexibility, in other words, was more or less the same range of devices with which federal powerbrokers have been commandeering local

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policies for decades. Deactivating the full range was, to put it mildly, a tall order.

Constitutional confusion?

Some of the testimony at the hearings, moreover, raised what sounded like constitutional objections against the government's intrusions. One witness spoke of the need to check an "unprecedented usurpation" of "traditional state authority." Another cited the widening perimeter of federal actions that "had preempted state laws affecting trade, telecommunications, financial services, electronic commerce, and other issues."

A basic difficulty with this line of attack is that, although defenders of states' rights have alluded to "traditional" state prerogatives for more than two centuries, no one has been able to delineate what they are. Surely, federal displacement of state statutes in the realms of trade, financial services, and much more is anything but unprecedented. A national restriction on state taxation of electronic commerce may seem like an "unprecedented usurpation" but only because the Internet is new, not because disputes over state taxes are. At the crux of the fabled case of *McCulloch v. Maryland*, 181 years ago, was a state tax that the U.S. Supreme Court disallowed.

In the latter third of the nineteenth century and first third of the twentieth, the Supreme Court strove repeatedly to parse economic activities that Congress could constitutionally regulate and activities that would remain under the aegis of the states. The result was a welter of seemingly arbitrary distinctions: Federal laws governing the movement of lottery tickets, liquor, prostitutes, and harmful foods and drugs were upheld, while other basic functions—including manufacturing, insurance, and farming—were classified as *intra*state commerce, hence left to state regulators. By the 1940s, however, the Court had changed its mind. Not only would farmers and manufacturers be subject to federal regulation of commerce but, in time, just about anybody else, whether the local janitor or window-washer, was too, if he happened to work for a company transacting business across state lines.

Amid this expanding centralism some inexplicable anomalies have persisted. Why, for example, are lawyers but not baseball players said to engage in interstate commerce, so that

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federal antitrust laws tag the former but not the latter? Why, according to the courts, may the Commerce Clause empower Congress to instruct the city of San Antonio how to pay its transit system operators but not to direct the local police to perform background checks on prospective gun purchasers? True, the courts recently have affirmed for state governments Tenth Amendment relief from federal directives for the disposal of radioactive waste and Eleventh Amendment immunity from certain lawsuits arising under federal labor laws. Yet the same guarantee of local latitude has not been extended for such matters as the administration of mental health facilities, intrastate sales of natural gas, or the tax-exempt status of municipal bonds.

If judicial rulings on dual sovereignty sometimes appear to lack consistency, the determinations of lawmakers and presidents can be downright fickle. The Republican majorities in the 104th Congress proclaimed a commitment to devolution. But soon the same Republican legislators preempted, among other duties of the states, the enforcement of child-support laws and the eligibility standards of legal aliens for public assistance. President Clinton, a former governor, came to office determined to rehabilitate state competencies in key areas. His blueprint in 1992 listed criminal justice as an area in which no expanded federal role was justified. A few years later, however, Clinton approved legislation federalizing numerous crimes that were previously the sole purview of local law-enforcement officials.

Regardless of whether these vagaries are intellectually defensible or ultimately capricious, this much is certain: They have provided few practical guidelines for determining where state sovereignty should give way to federal supremacy. Interpretations of the Tenth Amendment, in other words, have not drawn a distinct demarcation. Occasionally, politicians and judges have invoked that amendment to restrain the federal government from aggrandizing powers supposedly reserved to the states, but the constitutionality of the disputed aggrandizement has been decided not according to some clear organizing principle but mostly on an ad hoc basis. The phenomenon, therefore, is not easily critiqued on constitutional grounds. Albeit with exceptions, the courts, not to mention the other

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branches, have deemed that even the strangest assertions of federal primacy are permissible.

Coercive federalism

To suspect that a legalistic critique of federal preemptions was bound to fail, however, is hardly to imply that critics do not have much of a case. The practice of displacing state policies with federal ones, though sometimes quite justifiable, has arguably become so pervasive and often injudicious that the outcome is often, not surprisingly, inefficiency and public distrust.

At issue, again, is a variety of means by which the federal government dictates to the states what they must or must not do. The methods include policies that, technically, are grants-in-aid. In theory, states can decline to receive federal money, but in practice that option is mostly illusory, and federal stipulation of increasingly intricate grant conditions overrides or distorts local priorities. New federal strings are often attached after aid programs have been institutionalized; by then, powerful constituencies are so deeply invested in the programs, and so fiercely protective of them, that what started as a voluntary partnership with the states degenerates to federal arrogation. And typically, federal rules remain firmly in place even if congressional appropriations fall far short of authorizations. The local provision of special education for students with disabilities, for instance, is essentially governed by federal law, even though Congress has never appropriated anything near its authorized share of this $43 billion-a-year mandate.

These bait-and-switch dynamics aside, much of the nation's public agenda is simply too expensive for the states to administer on their own, so it is hard to imagine how they could forgo the promised federal contributions. No matter how many onerous obligations Congress affixes to it, could any state really refuse to accept federal support for Medicaid?

How many preemptive statutes, broadly speaking, has Congress enacted? The only authoritative answer to that question was supplied a number of years ago by the now-defunct U.S. Advisory Commission on Intergovernmental Relations (ACIR). The commission's compendium painted an astonishing picture. There were more preemptive laws passed between 1960 and 1969 than in any previous decade, but what happened during

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the 1960s pales in comparison with the explosion that followed. More preemptions were piled on after 1970 than in the entire preceding history of the Republic.

Interestingly, the Reagan and Bush administrations scarcely slowed this surge of coercive federalism. Despite their protestations against the Washington-knows-best mindset, the Republican presidents signed several pieces of legislation setting federal standards for matters that were once decided by the states. A number of these had virtually no intelligible rationale for turning a local concern into a federal preoccupation. Who should be allowed to consume alcoholic beverages, whether a local school needs to remove asbestos, what height and strength qualifications a local fire department chooses for its recruits, or how a community purifies its drinking water, for example, are hardly questions that demand national answers. Yet each became subject to national directives.

The use and abuse of centralization

It strains credulity to suppose that the world suddenly became so utterly different after 1970 as to warrant what the ACIR documented: a *doubling* of the amount of centralization in American government. However, some fundamental changes did occur that necessitated broader federal intervention.

The rise of environmentalism was one. A substantial share of the intergovernmental strictures imposed in the past 30 years pertain to environmental protection. For some forms of pollution the abatement efforts of localities and states would not suffice, for the simple reason that much pollution crosses boundaries. Certainly, a forceful case could be made for national oversight of the Clean Air Act. Emissions of greenhouse gases and of sulfur dioxide are not local problems. Even local concentrations of ozone can blow across hundreds of miles, and one region's foul air can become another's impure water.

Second, the world economy has become much more integrated. National prosperity now rests more than ever on the ability of firms to compete in global markets, and on standardizing rules that might otherwise complicate the free flow of trade, foreign investment, and financial capital. In the United States, as in other major trading partners such as the European Union, it is no surprise that higher orders of government in-

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creasingly have moved to dismantle local impediments to negotiating international trade treaties, improving the competitive position of businesses, and streamlining financial markets. Globalization at least partly explains recent federal efforts to harmonize banking regulations and to challenge anticompetitive practices in some states—their decisions to harbor trade sanctions, for instance, and to countenance boundless tort litigation.

Alongside the accelerating liberalization of international commerce came advances in procompetitive regulatory reform of key U.S. industries. This process, too, has called for correcting some local eccentricities by imposing more uniformity. Restructuring the electricity industry offers a current example. Although state initiatives account for much of the progress that has been made to date, the complete deregulation of electric power may require federal legislation to ensure a successful outcome nationwide.

Finally, the breakneck pace of change in telecommunications and information technologies is also calling local variances into question. The cellular phone industry in Europe is ascendant because, among other considerations, the European Union promptly established a single Continent-wide technical standard. Meanwhile, wireless service in the United States has lagged in part because companies here have to navigate multiple systems. No doubt, this anachronism cannot last indefinitely. Similarly, another local convention—namely, excise taxation on almost any purchase of goods and services within the geographic jurisdictions of states—chafes against the borderless nature of online commerce and against the national, if not international, interest in encouraging its growth.

But along with solid justifications for federal rules to supersede the variations among states, there are also plenty of unconvincing reasons more rooted in bureaucratic rigidity or raw politics than in sober deliberation. For example, too many of the federal environmental programs that burgeoned after 1970 adopted a one-size-fits-all approach. Not every environmental problem has the transboundary properties of air pollution. For all but a handful of biological contaminants in drinking water, for instance, the dangers of high concentrations of toxins are borne only by residents in the vicinity who might consume the polluted water for a lifetime.

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Another notable share of the centrally dictated standards that have multiplied in the past three decades falls under the capacious category of civil rights. What began in the 1960s as a straightforward goal of ensuring equal opportunity for African Americans would later expand into a vast apparatus of federally mandated protections and preferences for multiple minorities, women, the elderly, the disabled, and so on. It is questionable whether all these groups merit the same compulsory remedies, and whether the remedies ought to be designed and decreed from the top down.

Consider the rights of persons with disabilities. Accommodating the physically impaired is a just and desirable goal, but should every state and municipality be told how to improve handicapped access to its public facilities? To comply with the Department of Transportation's (DOT) rules for modernizing public buses and retrofitting subways, New York City concluded in 1980 that the requisite capital improvements and annual operating bills would amount to a budget-busting expense. As the city's mayor, Edward I. Koch, wrote in *The Public Interest* at the time, "It would be cheaper for us to provide every severely disabled person with taxi service than make 255 of our subway stations accessible."

Mercifully, after pitched legal battles, the federal planners relented and lowered the costs. New York, with its old and extensive transit system, should never have been sidetracked from opting for cost-effective alternatives to the DOT's retrofit plans. The larger point here is that when top-heavy federal regulations indiscriminately narrow local options, they risk stifling local innovations and foreclosing solutions that fit local circumstances. The result can be enormously wasteful.

Federalizing crime

In recent years Congress, with more than a little acquiescence by the Clinton administration, has been busy federalizing yet another field in which the states used to have primary responsibility—namely, controlling crime. This raises the troubling question of "whether we want most of our legal relationships decided at the national rather than local level," as Chief Justice William Rehnquist pointedly asked in his 1998 report on the federal judiciary. Nationalizing criminal law is not com-

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parable to merely setting standards for some aspects of state civil justice systems. The excesses of certain types of local civil suits, already rampant, may be abetted by special interests (such as the trial lawyers' lobby) that not only may wield disproportionate influence in state legislatures but also often seem oblivious to the damage inordinate litigation can do to the national welfare. National tort reform has a justification: It may protect the commonweal from the capture of state polities by what James Madison called, in *Federalist* 10, "the mischiefs of faction."

The same logic does not hold for the ascent of national authority over criminal law. Granted, the administration of criminal justice varies, sometimes peculiarly, among states. But the differences in how crime is policed by the states usually reflect diverse conditions and public preferences, not the clout of potent pressure groups in dogged pursuit of material gain for themselves. If anything, federal supervision of state law enforcement and correctional policies runs the risk of spawning such questionable stakeholders where none existed. For example, prodding the states to adopt stricter sentencing guidelines may sound like an unalloyed reform. But what if it impels some states to overspend on new prison construction, and entrenches a vested interest in mass incarcerations? At a minimum, if this federally induced growth industry expands at the expense of other local needs, or of local experimentation with better alternatives, it decidedly misallocates resources.

Also behind Justice Rehnquist's critique is serious doubt whether national institutions are prepared to cope with the added burden they appropriate. Hauling the federal judiciary into the adjudication of more and more local crimes taxes its limited resources and capabilities. In contrast to the overloaded central administrations of unitary regimes, a federal system attains efficiencies through a division of labor and the decentralization of routine tasks. This advantage of federalism will erode if Congress persists in preempting one state function after another.

Credibility crisis

In 1964, three-quarters of the American public said they trusted the federal government to do the right thing most of

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the time. By 1998, barely over a quarter did. Confidence in state and local governments has also sagged, but far less. The number of Americans who said they preferred more concentration of power at the federal level than in the states plunged from 56 percent in 1936 to 26 percent by 1995. According to a survey reported in 1998 by the Pew Research Center for the People and the Press, 59 percent of respondents now viewed the federal government unfavorably, compared to 29 percent who held an unfavorable view of the states. The concept of returning more responsibilities to the states has gained popularity, even if it promises no net reduction in tax burdens. A 1995 poll asked, "Would you still favor shifting responsibility for programs from the federal government to the state governments *if it meant your state taxes would increase to offset a decrease in your federal taxes?*" Fully 76 percent said yes, only 16 percent said no. Of course, this support sometimes diminishes when "shifting responsibility" means devolving specific programs rather than discussing abstractions. Still, it seems clear that the public has become disenchanted with the intrusions of Washington in affairs formerly settled through self-governance.

During the past 35 years, Americans have largely tolerated a hyperactive federal government when its activism was wrapped in the mantle of civil rights. But even then, patience wore out as federal paternalists overreached. The national government did not endear itself to a majority of citizens by ordering numerous cities to bus thousands of schoolchildren, sometimes across vast distances, in the name of racial balance. Nor did Washington's social engineers earn the respect of most voters by insinuating that, as a condition of aid, state universities should practice reverse discrimination to achieve suitably "diverse" enrollments. Such distortions of a shared national value—equality of opportunity—offended common sense and hence provoked a backlash.

So did the presumption that federal judges should be the final arbiters of various other complex moral issues on which there was no consensus. Whatever one's views on legalized abortion, for instance, substantial segments of the public are understandably uncomfortable with an absolute, nationwide standard set by judicial fiat. On such highly charged, morally

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unsettled questions, many Americans would prefer a measure of community discretion, greater federal humility, and at a minimum, no Olympian edict from an unelected body invoking the "penumbras" of the Bill of Rights to decide matters of life and death.

The politics of preemption

The inordinately long arm of federal law in local civic life is more than clumsy; its intrusive reach may alienate, if not infantilize, significant parts of American society. Not unaware of this failure, why does the Washington political establishment have trouble desisting?

To solve this puzzle, it is useful to begin by recalling that since 1970 majorities of both parties in Congress have not hesitated to nationalize issues when it was to the advantage of their respective clienteles. During these decades, Republicans have repeatedly paid lip service to decentralization. Yet a recent systematic study of roll calls in the 98th through the 101st Congresses actually found the Republicans more prone than the Democrats to overrule state and local regulations.

One source of this proclivity, of course, has been the customary prominence of business regulatory issues on the GOP's agenda. Large companies tend to prefer comprehensive regulatory standards to a hodgepodge of local rules. How, for example, did bipartisan support for federal motor-vehicle safety and emissions controls coalesce? The automobile industry lobbied to preempt the states from setting disparate standards, some of which might be overly militant. Better to have one 500-pound gorilla in charge of regulating the industry, its lobbyists reckoned, than to deal with 50 monkeys on steroids.

Politicians of either party today also invoke "the law of the land" in more and more controversies because, contrary to Tip O'Neill's aphorism, their politics are no longer local. As links to local party organizations have weakened, the allegiances of congressmen have moved increasingly beyond strictly parochial concerns to the causes of *national* lobbies and advocacy groups. This delocalization of influence is reflected in the pattern of congressional campaign finance. Whereas candidates, particularly for House seats, once depended primarily on the backing of the local party hierarchy, the soaring costs of cam-

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paigns now compel office-seekers to rely more heavily on external sources. The winners of recent House elections have drawn upwards of 40 percent of their contributions from political action committees—that is, from the funding arms of national interest groups.

Further, the media contribute to the heightened national profile of every imaginable misfortune by depicting the events as "trends" worthy of prime-time attention. Members of Congress do not want to seem uncaring about the latest reported tragedy. Their response: Enact a law. This was how, for example, the Anti-Car Theft Act, "Megan's Law," and various other federal incursions into local law enforcement sailed through.

In addition, federal rules supplant local ones because policy debates in Washington are now framed increasingly in the terminology of rights. Emulating the civil rights movement of the 1960s, interests of all kinds have found it expedient to portray their claims as a quest for basic justice. Major environmental programs, for example, were said to secure everyone's "*inherent right* to the enjoyment of pure and uncontaminated air" or water. In the past few years, even irate airline passengers, truckers protesting fuel prices, and subscribers to health-maintenance organizations have queued up to obtain not just relief but a "bill of rights." This style of redress implies national commands and controls. A right, after all, is not a mere aspiration that can be adjusted up or down according to local preferences; it is absolute and universalistic. There is, in other words, no such thing as a partial right; rights are all or nothing. And because these legal warrants, by definition, are not divisible, they cannot be allowed to vary by locale.

To be sure, a skeptic might consider much of the resulting standardization superfluous. By the time policy makers in Washington had begun introducing proposals to affirm a universal right to special education for preschool handicapped children, 42 states already had begun programs of this sort. Before Congress proclaimed that every student should be entitled to attend an asbestos-free school, at least 31 states had programs to inspect and abate the potentially hazardous substance. Proponents of central preemption, however, have been undeterred. By their logic, if so many states have already blazed a trail,

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national standards only complete what the states have started. Thus states are as likely to have their independence shorn when they are proactive and progressive as when they are laggards.

This is not to say that national preemption is always instigated inside the Beltway. Sometimes state officials agitate to have their powers trumped. In the fiercely litigious arena of environmental policy, for instance, state and local officials have sought cover under the blanket of federal tutelage. Invoking a coast-to-coast rule, even if a blunt instrument, is often safer than trying to defend nuanced exercises of local discretion.

Still, the centripetal force of Washington has largely maintained a momentum of its own. Contrary to what one might suppose, fiscal constraints over the past 20 years have scarcely shrunk the federal leviathan. Up to a point, its influence used to increase primarily with the growth of grants-in-aid. Once many state and local governments became, so to speak, federal aid junkies, they would be at the mercy of congressional benefactors and federal patron agencies that could attach to their dollars increasingly elaborate requirements. But the inexorable tightening of grant conditions was in some ways less coercive than the tendency of national policy makers to impose costly undertakings on local authorities without offering any compensation.

Budgetary deficits in the 1980s, followed by relatively austere discretionary spending in the 1990s, provided a pretext for this practice of mandating activities and shifting costs. The political incentives to prescribe or prohibit state functions in this fashion are formidable. National politicians could now continue to claim credit for their supposed good deeds but without incurring, to use Princeton political scientist R. Douglas Arnold's term, "traceable" blame for the tax increases required.

Finally, no explanation for the consolidation of federal power is more fundamental than the historic volte-face of the federal judiciary. For most of the nation's history, the courts kept federal hegemony in check. By 1937, however, the Supreme Court had mostly switched sides, and in 1941 it concluded that the Tenth Amendment was "but a truism" (*United States v. Darby*). Judicial conceptions of the Commerce Clause, among other muscular provisions of the Constitution, became so open-

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ended that almost any act of Congress could be justified under them. According to a 1996 *Wall Street Journal* article, a federal judge sustained the constitutionality of the Violence Against Women Act (a 1994 statute that effectively preempted state criminal codes in the case of crimes "motivated by gender") because the law was "a proper exercise of congressional power under the Commerce Clause." Interstate commerce, the judge thought, might suffer if victimized women experienced medical costs, diminished productivity, fear of traveling on business, and so forth. Last May, in *United States v. Morrison*, the Supreme Court finally signaled that this type of reasoning would not stand up forever. Even so, the pendulum of opinion is quite unlikely to swing back to where it was some 65 years ago.

This last point bears emphasizing. Even if conservative justices hold their slight edge for the foreseeable future (a big "if"), the Supreme Court's judgments on federal-state disputes will continue to be a mixed bag. The Court's detractors have been quick to assail it when it has defended the states, but they seldom mention that plenty of decisions have gone the opposite way. The same Court, after all, recently overturned state policies governing everything from child-visitation rights and oil-tanker safety training, to the sale of personal databases by motor-vehicle bureaus and the ability of car-accident victims to invoke state safety standards in lawsuits.

A nationalist government

The statutory reforms Congress debated in 1999 were designed to roll back, or at least decelerate, the federal juggernaut by interposing procedural requirements that rule makers and legislators would have to fulfill before preemptive policies could take effect. Under the Thompson bill, rules promulgated by federal agencies or pieces of legislation clearing congressional committees would have required "impact assessments"—that is, reports on how the measures might affect intergovernmental relations. These were to be buttressed by independent evaluations from the Congressional Budget Office (CBO), among other watchdogs. Any federal statute or rule effectively subordinating state and local laws would have had to enunciate its intent clearly or risk nullification by judicial review.

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These sorts of suggestions had deep roots. Their inspirations could be traced to largely ineffectual executive orders in the 1980s and 1990s, to the critical work of the Advisory Commission on Intergovernmental Relations in 1984, 1988, and 1992, and even to the 1955 report of the Kestnbaum Commission (a body appointed by President Eisenhower to help define the proper parameters of federal and state jurisdictions). The only major departure the Thompson proposal made from these earlier projects was that it no longer relied on mere exhortation; state officials could now go to court to challenge federal laws that, among other things, failed to mention explicitly what state statutes were being preempted.

Lurking here was the possibility of considerable litigation, as the courts tried to determine whether legislative language was "explicit" enough, and so on. Opening yet another avenue for legal squabbles seemed like a dubious exercise, but it also might have served part of its intended purpose: to delay, if not deflect, at least some peremptory federal actions.

The additional reporting requirements probably would have further contributed to this result. This was not simply because more reporting would bury federal administrators in red tape. (They are already suffocating.) Rather, the formal disclosure of impacts on federal-state relations, especially when assessed by the CBO, occasionally might have disciplined a few members of Congress: Casually voting to strip power from the states might become more difficult when a vote's implications are transparent.

That said, to suppose that such palliatives, if they had been adopted, could truly stay the federal government's heavy hand is a stretch. The operative constitutional restraints on the federal presence have remained pretty weak. Surely, in the sweep of its jurisprudence since the late 1930s, the Supreme Court has maintained precious few limitations, notwithstanding a handful of closely decided recent verdicts that may restore some limits. Indeed, especially in the past three decades, federal court orders have themselves become a prime vehicle for national micromanagement of local government. Senator Thompson's reform scarcely addressed the towering issue of judicial activism.

Economic and technological changes will continue to fur-

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nish many reasonable arguments for replacing local with national, even international, standards. Whether the resulting regimentation is always commendable or not, powerful corporate lobbies will apply great pressure to secure it. Further, for this and other reasons, both parties in Congress remain receptive to centralist claims. There is not much basis for believing that all this will change. Multiple forces—including the role of the media and of contemporary campaign finance, to name but two—will continue to intensify the political temptations to nationalize, or preempt, public policy in the American federal system. At best, those temptations could only be tweaked, not suspended, by schemes such as a Federalism Accountability Act.

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Crime, punishment, and prevention

PAUL H. ROBINSON

OVER the last decade, a remarkable change has occurred in the U.S. criminal justice system. Traditionally devoted to the punishment of past crime, it has begun to focus as well on the prevention of future crime by incarceration and control of dangerous offenders. Habitual offender statutes, like "three strikes" laws, sentence repeat offenders to life imprisonment. Jurisdictional reforms lower the age at which juveniles may be tried as adults, increasing the available terms of imprisonment beyond those of juvenile court. Gang membership and recruitment are criminalized. "Megan's Law" statutes require community notification of a convicted sex offender. "Sexual predator" statutes provide for civil detention of offenders who remain dangerous at the conclusion of their criminal term. Sentencing guidelines increase the sentence of offenders who have a prior criminal

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history, since these offenders are seen as the most likely to commit future crimes.

The evolution from punishment to prevention has not been accompanied by a corresponding change in how the criminal justice system advertises itself. It still presents itself as a system of criminal "justice" that imposes "punishment." But it is impossible to *punish dangerousness* within the meaning of those terms. To "punish" is "to cause a person to undergo pain, loss, or suffering for a crime or wrongdoing." Punishment can only exist in relation to a past harm or evil. "Dangerous" means "likely to cause injury, pain, etc."—that is, a threat of future harm. One can "restrain" or "detain" or "incapacitate" a dangerous person; but one cannot logically "punish" dangerousness. Yet our current criminal justice system increasingly blurs the difference between punishment and prevention, as if one could punish dangerousness. Why the shift to preventive detention? And why the attempt to keep the old "criminal justice" as window dressing?

The continuing crime problem

Every society must have a right to defend itself, and our society has good reason to feel it needs protection. Even with the most recent declines, the violent crime rate remains more than three times higher than during the decade following World War II. Today's aggravated assault rate is nearly four times what it was then. News reports commonly celebrate the current drop in crime rates to the levels of the late 1970s, failing to note that by then the long road of unbroken annual crime increases had already tripled the rates of the 1950s. Given the erupting epidemic of juvenile crime, the unknown effect of the coming wave of crack babies, and a host of other predictable or unpredictable changes, the decreases may not continue. But even if they did, the declining crime rate of the last eight years would have to continue unbroken for *another three decades* before we returned to the crime levels the Baby Boomers enjoyed as children.

And even if crime rates continued to drop every year for the next three decades, people would still have reason to be dissatisfied. As a result of the past three-plus decades of crime increases, people have dramatically changed how they live.

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We no longer let our children walk home from school alone. We dead-bolt our doors, put "the Club" on our cars, and live in security-staffed apartments and "gated" communities. Current crime rates are as high as they are despite these precautions, and would be even higher without them. A return to the patterns of living we enjoyed when we were children would mean not only reducing crime to 1950s rates but recapturing the freedom and sense of security we had then. The apparent impossibility of that only highlights how much we have lost to crime since the fifties.

From this perspective, it is understandable that Americans should demand greater protection and that legislators should seek new ways to provide it. Yet the trend of the last decade—of shifting the criminal justice system toward the detention of dangerous offenders—is a move in the wrong direction. The difficulty lies not in the laudable attempt to prevent future crime but rather in using the criminal justice system to achieve the goal. That approach perverts the justice process and will undercut the criminal justice system's effectiveness in controlling crime. At the same time, the basic features of the criminal justice system necessarily make it a costly yet ineffective "preventive-detention system."

What is preferable is *a segregation of the punishment and prevention systems*. Punishment, especially through imprisonment, happily produces a collateral effect of incapacitation. If preventive detention is needed beyond the prison term of deserved punishment, it ought to be provided by a separate system that is open about its preventive purpose and is specifically designed to perform that function. Punishment and prevention are different functions—each with its own criteria and procedures. Trying to use a single system to perform both ensures that neither will be performed effectively. Today's mixed system, in which preventive detention is cloaked as criminal justice, achieves neither justice nor protection.

And justice for all?

Each of the prevention-based reforms of recent years distorts the goal of justice. For example, lowering the age of adult prosecution increases the number of young offenders who are held criminally liable. But there is little dispute that

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many young offenders, especially those below the age of 15, lack the cognitive and control capacities of normal adults. Some may not appreciate the enormity of the consequences of their acts; others may lack the normal behavior-control mechanisms.

If such dysfunctions exist in an adult offender—due to insanity or involuntary intoxication, for example—an "excuse defense," or at least a formal mitigation, is generally available. Yet a similarly impaired young offender will get no mitigation or defense in adult courts. Traditionally, these courts have had no "immaturity excuse" since youthful offenders were dealt with in juvenile court. The recent trend to lower the age of adult prosecution has created the need for such an excuse defense but none has been developed, perhaps because it would interfere with the recent goal of gaining control over dangerous offenders without regard to their blamelessness.

The new policies that increase prison terms for offenders with prior criminal records—e.g., "three-strikes" and other habitual-offender statutes and prevention-oriented sentencing guidelines—create more common and damaging problems. Instances of long-term imprisonment for a minor offense are well known, such as the life sentence for a third minor check fraud in the Supreme Court case of *Rummel v. Estelle*. But the more pervasive, if less obvious, problem appears in every case in which a habitual-offender statute or guideline is used: The sentence imposed exceeds what is deserved for the offense committed. Indeed, that is the point of such statutes. They significantly increase the sentence over what it would be for the offense committed on the grounds that a prior record may predict future offenses. But the effect of such a policy is to have the criminal justice system regularly impose sentences that exceed the punishment deserved.

One can develop a justice argument that more punishment is deserved for an offense when it is a repeat offense. The new violation suggests a certain "nose-thumbing" at the system—a damaging public display of the offender's disregard for the community's norms. But such nose-thumbing is at most one of many possible factors that may aggravate an offense, like the use of needless violence or the targeting of a particularly vulnerable victim. One can hardly argue that the nose-

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thumbing is more blameworthy than the offense itself. For example, a rape is a terrible crime. It may be more condemnable when committed by someone who has committed a previous offense, but the nose-thumbing is hardly more condemnable than the rape itself. Yet the new preventive doctrines can double, triple, or quadruple a sentence based upon a prior criminal record.

Although less common, the prevention approach can have the opposite effect, giving an offender less punishment than he deserves. For example, some states, following the Model Penal Code, lessen the punishment if the attempted criminal act was "inherently unlikely" to succeed and the offender does not otherwise present a danger. In several documented cases, prisoners with AIDS have spit at prison guards, believing they can thereby give the guard AIDS. These prisoners may not actually be dangerous, but they have demonstrated their willingness to cause another's death. That the offender has failed in his attempted murder may call for the normal discount given to an unsuccessful attempt, as compared to a completed murder, but there seems little reason from a justice perspective to reduce his punishment any further than that. Lack of dangerousness does not vitiate blameworthiness.

The problem of imposing less punishment than deserved arises more frequently in sentencing systems with broad discretion (e.g., without sentencing guidelines) where individual sentencing judges go easy on offenders they see as no longer a threat. The elderly Nazi concentration camp official or the now unmasked corrupt bank official may no longer present a danger but that hardly reduces the punishment their crimes deserve.

There is nothing wrong with a society protecting itself from dangerous offenders. What is objectionable is allowing such prevention to pervert the course of justice, whether it gives an offender more punishment than he deserves or less.

Such deviations from desert not only fail the goal of justice but also damage the crime-fighting effectiveness of the criminal justice system. A considerable body of social-science research suggests that social norms, more than the fear of official punishment, produce law-abidingness. To harness the enormous power of social norms, the criminal law must be rooted

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in the ideal of justice. If the law speaks with the community's moral authority, it can effectively stigmatize offenders and reinforce moral standards. In contrast, a criminal law that is seen as pursuing some goal other than justice—even one as laudable as preventing future crimes—will not gain broad societal sanction and moral credibility. As the system shifts from blameworthiness to dangerousness, people will come to understand that criminal liability does not necessarily suggest a defendant's moral blameworthiness for past condemnable conduct; it may simply reflect a prediction of future conduct. This loss of moral credibility with the public will detract from the criminal justice system's ability to fight crime. A criminal justice system without moral authority cannot stigmatize offenders by imposing liability or help to shape moral norms, and it cannot signal morally condemnable conduct that is not obviously so on its face.

Prevention in disguise

Ironically, the perversions of justice suffered in the name of prevention also harm the prevention system itself. Difficulties arise primarily because of the effort to cloak the preventive measures as doctrines of criminal *justice*. Why the subterfuge? If reformers wanted to detain dangerous offenders, why not openly create a preventive system to fill in where criminal justice incarceration ends? Most jurisdictions allow civil commitment of persons who are dangerous because of mental illness, drug dependency, or contagious disease. Why the reluctance to preventively detain offenders who remain dangerous at the conclusion of their deserved criminal term of imprisonment?

The answer may reside in the bitter controversy prompted by the preventive-detention legislation of the 1960s. That legislation was decried as "Clockwork Orange" and "Alice in Wonderland justice," in which the punishment precedes the offense. It was said to introduce a "police state," to be "intellectually dishonest," "one of the most tragic mistakes we as a society could make." It "would change the complexion of American justice," and was "simply not the American way."

But the 1960s preventive-detention legislation was controversial in large part because it provided *pretrial* preventive

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detention. In contrast, most of the current reforms provide preventive detention only after trial and conviction, an important difference. On the other hand, part of pretrial preventive detention's bad reputation stems from its procedure of sentencing before trial. That same objection can be made of present day post-conviction preventive detention, because detention for longer than the deserved term of imprisonment is justified as preventing predicted *future* crimes. It is not only punishment for an offense for which the detainee has not yet been convicted; it is punishment for an offense that he has not yet even committed!

Herein lies the genius of the current system's cloaking of preventive detention as criminal justice. By obscuring the preventive nature of the liability and sentence, by making it seem a part of a criminal justice system, the preventive-detention controversy can be avoided altogether.

But the effect of such cloaking is to impede the system's preventive effectiveness. For example, instead of examining each offender to determine the person's actual present dangerousness, the current cloaked system uses prior criminal record as a stand-in for dangerousness. But prior record is only a rough approximation of actual dangerousness and its use will guarantee unnecessary errors of both inclusion and exclusion. Indeed, criminality is highly age-related, and whether due to changes in testosterone levels or something else, the offending rate drops off steadily from its peak in the early twenties. The prior-record measure does not take account of this fact. Offenders with their criminal careers before them are not detained, because they have not yet built up their criminal résumés, while offenders with their criminal careers behind them are detained because they have the requisite criminal record. This gives us a costly prevention system of prisons full of geriatric life-termers, and simultaneously ineffective prevention, as the system does little during the period when the need for preventive detention is at its greatest. A rational and cost-effective preventive-detention system would more readily detain young offenders during their crime-prone years and release them for their crime-free older years.

An equally counterproductive aspect of the cloaked system is its early decisions and fixed ("determinate") sentences. Pub-

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lic cynicism over a system that allowed subsequent reductions in sentences, as by a parole board, had given rise in recent years to calls for "truth in sentencing," determinate or fixed sentences, and the abolition of early release on parole. These reforms are quite understandable, but when applied in the context of prevention, difficulties emerge. Since the determinate sentences are shrouded in the cloak of justice, they are imposed soon after trial. But this sentencing practice is highly inappropriate and ineffective when the goal is prevention. It is difficult enough to determine a person's present dangerousness—whether he would commit an offense if released today. It is that much more difficult to predict an offender's future dangerousness—whether he would commit an offense if released at the end of the deserved punishment term, two, ten, or thirty years from now. It is still more difficult, if not impossible, to predict today precisely how long the future preventive detention will need to last. Yet that is what determinate sentencing demands: the imposition of a fixed term that predicts the needs of prevention far into the future.

A sentencing judge or guideline drafter is left to the grossest sort of speculation, inevitably doomed to setting either a term too long—thus unfairly detaining a nondangerous offender and wasting preventive resources—or a term too short—thus failing to provide adequate prevention. Given the two bad choices, it should be no surprise that decision makers commonly opt for making an error of the first sort rather than the second, hence the recent increases in the terms of imprisonment.

A rational preventive-detention system would do what current civil-commitment systems do: make a determination of present dangerousness in setting detention for a limited period, commonly six months, then periodically revisit the decision to determine whether the need for detention continues. Such a system is not only better for offenders, because it is more likely to limit detention to periods of actual dangerousness, but also better for society, because, while it provides needed detention, it avoids spending prevention dollars on needless incarceration.

Also distorted by the need for the justice cloak is the method of restraint. A rational preventive-detention system would fol-

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low a principle of minimum intrusion: A detainee would be held at the minimum level of restraint needed for community safety. If house arrest or regular medication would provide the same level of community safety as imprisonment, then the former would be preferred as less intrusive to the offender (and less costly to the community). A term of deserved punishment, in contrast, often may require a prison term in order to reaffirm the community's strong condemnation of the offense. House arrest or regular medication may be unacceptable substitutes because they could be seen as trivializing the offense. When preventive detention must operate under the cloak of criminal justice, it too often must opt for imprisonment even when prevention would be satisfied with less intrusive restraint.

Similar distortion occurs in determining incarceration conditions. A criminal punishment term is meant to impose suffering, within the bounds of human dignity; punitive conditions are entirely consistent with a punishment rationale for the incarceration. But when an offender has served the portion of his sentence for the crime he committed and continues to be detained for preventive reasons, punitive conditions become inappropriate. When we civilly commit persons for the protection of the community—persons with contagious diseases, drug dependencies, or mental illness—we try to avoid punitive conditions. An offender who has served his deserved term of punishment ought similarly to be subject to nonpunitive conditions during his preventive detention.

Finally, and in the same vein, an offender who is being detained for preventive reasons ought to have a right to treatment, especially if it can reduce the length or intrusiveness of his detention. This is simply a specialized application of the general principle that we ought not restrict an individual's liberty to benefit others more than is necessary to achieve that benefit. If treatment can reduce the length of preventive detention, then it ought to be provided.

Segregating justice and prevention

Fortunately, the conflict between justice and prevention can be avoided by simply segregating the two functions: by having a criminal justice system that focuses exclusively on

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imposing punishment for the past offense, no more, no less, and having a post-sentence civil-commitment system devoted to prevention. The sticking point in this proposal is not in having a criminal justice system that is guided only by justice. That is what the public assumes the criminal justice system has always sought to do. The difficulty comes, instead, with openly recognizing a system of preventive detention.

There is some precedent for preventive detention. As noted, all states presently allow civil commitment for society's protection. Moreover, many states have post-criminal-incarceration civil commitment of "sexual predators." Under these civil-commitment systems, the government can attempt to detain an offender at the conclusion of his criminal term if it can show continuing dangerousness.

Despite this precedent, there will be concern about creating a broader system of explicit preventive detention, and those concerns are understandable: The *Gulag Archipelago* potential for governmental abuse is real. But if the alternative is the present system of cloaked preventive detention, the risk is worth taking. An explicit system of post-criminal-commitment preventive detention would be better for both the community and for potential detainees.

The community is better off because such a segregated system offers both more justice and better protection from dangerous offenders. Allowing the criminal justice system to do justice is valuable for its own sake. It also gives the system greater moral credibility and thus greater long-term crime-control power. And a distinct system for preventive detention can, by looking directly at a person's present dangerousness, more accurately predict who is and who is not dangerous. Greater accuracy is enhanced further by periodic reevaluations, rather than the present unitary system's need to make a single prediction of dangerousness years in advance. Greater accuracy means more detention of the dangerous, better protection of the community, and less detention of the nondangerous, thus saving resources.

A segregated system also benefits the potential detainees. Better accuracy in prediction means less detention of nondangerous offenders, while periodic reevaluation means that detention will be limited to periods of actual dangerousness.

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Acknowledgment of the preventive nature of the detention also suggests a right to treatment, nonpunitive conditions, and the principle of minimum restraint, meaning greater freedom for those who are detained.

An open system of preventive detention ought also to be preferred precisely because it is open rather than cloaked. Instead of the current unproductive debates—which are typically about whether "three strikes" sentences are "too long"—we could turn our attention to the many aspects of preventive detention that cry out for discussion: What is the reliability of predictions of dangerousness? Is the threatened danger sufficient to justify the extent of intrusion on personal liberty? Are there less expensive or less intrusive measures that would as effectively protect the community? Under the current cloaked system, these issues escape examination. And finally, while no one can guarantee that a legislature or court will not attempt to abuse its power, an open system of prevention makes such abuse harder, not easier. The openly preventive nature of the system subjects it to closer scrutiny, as it should, a scrutiny the present cloaked system escapes. If there is a danger of governmental abuse of preventive detention, it is at its greatest when that preventive detention is cloaked as criminal justice.

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My time in the Peace Corps

SARAL WALDORF

WHEN President Kennedy created the Peace Corps in the early 1960s, he appealed to the idealism and patriotism of American youth—promising them an opportunity to change the world through volunteerism. But beyond such altruism, the Peace Corps had a strategic, Cold War purpose: to flood the world, especially the Third World, with young, bright, well-educated Americans, who would aid development, plant the seeds of democracy, and check the spread of Soviet communism. While its impact even during the Cold War was marginal at best (except perhaps as useful propaganda), the Peace Corps was at least then a defensible program—largely ineffectual, but defensible. Today, as the Peace Corps celebrates its nearly 40 years of existence, one needs to ask if it really has any substantive role left to play and whether the program justifies its fairly hefty expense here and abroad.

The case for the Peace Corps has always rested on contrary aims, the most important being the education of American

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youth in the ways of the world. A Jeffersonian belief that educated citizens bring enlightened governance has always driven the Peace Corps's emphasis on the young, still somewhat uninformed adult, who through overseas service comes to understand the fundamental unity and brotherhood of man and brings this understanding home. In fact, anthropologist Robert Textor, editor of the initial evaluation of the Peace Corps just six years after its creation, argued that returning volunteers should obtain preferential job treatment in government, academia, and business, because they bring back such valuable insights after two years of service in Third World countries.

Yet the Peace Corps charter clearly states that its first goal is not the education of American youth but the transfer of technical skills to developing countries. And so here lies the problem: How can mostly young, unskilled volunteers—often left alone with few resources in the middle of a Third World village—transfer useful technology with any effectiveness? Peace Corps, to its credit, has always been aware of the near impossibility of making its competing goals compatible. And every director under every administration has tried almost every conceivable scheme to try to professionalize its recruits without losing the spirit of volunteerism that has always been the Peace Corps's signature appeal.

But these efforts have been mostly a failure. The success rate of the Peace Corps in terms of the economic and political development of host countries has been next to nothing—sometimes worse—if one reads the various congressional, academic, and ex-volunteer evaluations made of the agency and its programs. Moreover, the pool of recruits has sharply declined in recent years, suggesting that enthusiasm for the Peace Corps's brand of sacrificial volunteerism is no longer popular among America's recent college graduates. This is not entirely unexpected, given the many alternatives for getting the same psychic rewards—a sense of doing good and a sense of being perceived as doing good by others—without leaving home and family for two years.

Today, there are many Peace Corps spin-offs that allow for volunteering on a small scale. Each fall, *USA Weekend* magazine holds its annual "Make A Difference Day" and features

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the "winners" in its pages. And in tune with the American way of turning service into leisure, one can now pay to be a short-term volunteer in, say, Ghana, by putting down about $2,000 for a two-week "community-service village experience" offered by vacation outfits such as Cross-Cultural Solutions, Global Volunteers, and even Elderhostel. And it's all tax-deductible.

Perhaps most significant, in a booming American economy that has produced many twenty-something millionaires, the idea of spending two years after college in poor, faraway lands is no longer as appealing an option as it was in the days of the compulsory draft and a much weaker job market.

So, from peaking in 1966 with 40,000 applicants and some 16,000 enrollees, today's Peace Corps enrollment runs at about 6,000, with a goal (by no means guaranteed) of increasing the number to 10,000 in the upcoming year. But while the numbers keep dwindling, the costs keep rising. The bill for one recruit in the field is about $25,000 per year, almost the yearly tuition for an Ivy League college, a cost picked up entirely by the taxpayer. On the plus side, the pool from which recruits are drawn has gotten older (the average age is now about 29 years old), with more females (almost half of all Peace Corps volunteers today are women), minorities, and senior citizens. But even with more skilled recruits, the Peace Corps mentality remains ambivalent, teetering between claims that it wants more professionals, yet, when getting them, feeling they may be too worldly or too academic to embrace the Peace Corps "experience."

Firsthand experience

I, an anthropologist, first became a volunteer in a joint Peace Corps and graduate school program in 1989, where I obtained an MSPH in international health. My first assignment was in a subdistrict (*arrondissement*) hospital in Mbe, Cameroon, where I worked in maternal and childcare and conducted research on access to health care for rural women.

In spite of various difficulties at this first post, some general to the workings of any volunteer group, others peculiar to the Peace Corps, I felt professionally useful enough to apply and be accepted for another two-year contract, this time as an AIDS worker in Malawi. This job was extremely demanding

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and rewarding, but again, the frustrations of working within conflicting Peace Corps philosophies made it difficult, sometimes impossible, to be treated as a skilled professional rather than a "volunteer" (i.e., amateur). My final formal experience with the Peace Corps was in Turkmenistan on a Soviet-style collective farm. After some truly nutty in-country Peace Corps training episodes—one involving a volunteer who taught Reflexology, where we massaged our fellow volunteers' feet in a combined get-to-know you and health session—and the realization that there was no real job to be done, I resigned. Later, while in Benin, I worked informally in the Cotonou Peace Corps library.

But my frustrations, I suspect, have never been equal to those of the supposed beneficiaries of this Peace Corps largesse and expertise—the developing host countries. As Karen Schwartz notes in her 1991 tragicomic oral history of the Peace Corps, *What You Can Do For Your Country*, developing countries resist taking volunteers unless they can do very specific jobs (after all, these countries have their own unemployed youth). And, in the end, they only take them on a quid pro quo basis with the United States (e.g., "we'll take your volunteers if USAID will take a closer look at our jupe factory proposal").

Conflicting philosophies

These problems were clearly understood from the beginning. As Warren Wiggins, deputy director of the Peace Corps in the Kennedy administration, explained to Schwartz, the newly-formed Peace Corps staff in 1960 was

> driven to make Peace Corps as large as possible quickly. I knew there would be a lot of problems getting Peace Corps started; there weren't any jobs waiting for volunteers. Third World countries weren't making any speeches asking for the United States to send our folk. And most of the people applying weren't skilled.

This lack of volunteer skill was disguised under Peace Corps's early promotion of Community Development or "CD." CD espoused the use of volunteers to organize local peasants into community self-help or education projects. As Wiggins also noted, "Everyone was scared shitless the volunteers might screw

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up," and so the staff didn't want volunteers to "try anything more difficult" than teaching English or being CD cheerleaders.

After Kennedy's assassination in 1963, and with increasing political unrest at home caused by the Vietnam War, Peace Corps enrollment declined. Many students chose to become active locally in civil rights marches and antiwar demonstrations rather than go overseas to set the world right.

During the Johnson years (1963-69), the Peace Corps became more overtly political. Johnson initially denied India the use of volunteers because it was using aid money to support a war against Pakistan instead of fighting famine at home. Later, Johnson reversed himself under congressional pressure, but an attempt by the Peace Corps to recruit volunteers with farm and agricultural experience failed. The nearly 1,300 volunteers who finally served in India during this time were the familiar "B.A. generalists"—the Peace Corps euphemism for unskilled college students.

This flood of generalists dismayed the many Indian officials who had to deal with them. As one local agriculturist put it, the volunteers

> knew nothing about agriculture, and I realized immediately that the Peace Corps was not a program of technicians and assistance, but rather one of cultural exchange. I am not opposed to cultural exchange, but we should not receive it under the false label of agricultural help. Our problems are too serious for that.

Other problems developed as volunteers found themselves in the middle of civil wars (the Nigerian-Biafran war, the Dominican Republic uprising, etc.). But the worst impediment remained host-country disappointment. Joe Blatchford, President Nixon's first Peace Corps director, told Schwartz he felt he had inherited an institution going out of business. "I kept hearing from host country officials we like your boys and girls very much, but don't you have any mechanics, business people, farmers, biology teachers, foresters?"

Although Blatchford's effort to professionalize the volunteers was seen by many former staff as a Nixon ploy to "replace liberal war protestors" with "silent majority types," he did open recruitment to families. The first group, six families with a total of 25 children, left for Ghana in 1970 with great

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fanfare. But the program drew mixed reviews, especially from in-country Peace Corps staff who had to find housing, medical care, and schools for dependents. After two years, the family program was phased out on grounds of expense, since the cost of maintaining a family in the field was three times greater than that of a single volunteer.

The next recruitment scheme to attract professionals involved advertising through trade associations and unions. Some 750 zoologists, botanists, and environmentalists solicited through the Smithsonian Institution worked worldwide from 1971-77 in rain forests and park reserves. This specialized placement program was well received by host countries and cut down on the longstanding and costly problem of "early volunteer termination" (or "ET," which still runs at about 20 percent on average for each group of recruits). But in 1976, President Carter's Peace Corps director, Carolyn Payton, reversed the "skilled volunteer" approach, saying: "Having a sophisticated ability immediately made you superior to the host country person you're working with. I would rather send volunteers who recognize their deficits and therefore relate to host nations on a level of equality and equalitarianism."

More radical changes followed under Sam Brown, director of ACTION, the umbrella agency which supervised the Peace Corps. Brown decided that volunteers should only serve in "deserving countries" (i.e., the poorest) and mandated family-planning programs (a very controversial issue in Third World countries, which resent attempts to reduce their populations). He also cut back on the Peace Corps's most popular program with host countries, the teaching of English, which he singled out as promoting elitism.

Loret Nilet Ruppe, director of the Peace Corps under President Reagan, attempted once again to professionalize the program. She recruited retired persons with technical skills and experience, particularly for farmer-to-farmer projects, and allowed the Peace Corps to cooperate with various graduate schools in public health, forestry, etc. She also initiated the Small Enterprise Development Program (SED), still in place today, whereby volunteers with business experience could help stimulate local enterprise by teaching basic bookkeeping, inventory management, and other entrepreneurial skills. Most

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successful, according to Schwartz, has been Ruppe's African Food System Initiative (AFSI), which used a team approach to address drought-associated problems in the Sahel, the dry land between the Sahara and tropical West Africa.

With the dramatic collapse of the Soviet Union in the early 1990s, opportunities opened up to send volunteers to Eastern Europe and even former Soviet republics. But here, once again, the familiar lament continued. As one of the first volunteers to Poland in 1990 explained: "The Peace Corps said we'd be great teachers ... but many were not prepared.... A Polish woman who took one of the classes we gave in English said she could pick out grammar and spelling mistakes volunteers were making at the blackboard!"

Under Clinton's watch

Mark D. Gearan, the director of the Peace Corps under President Clinton (until December, 1999), was an unabashed supporter of volunteer programs—including the Peace Corps, other American programs such as AmeriCorps, and many international programs. But competition among the many private and government-sponsored volunteer groups has grown intense, with turf wars inevitable. For instance, in Malawi, antagonism between VSO (the London-based Volunteer Service Overseas) AIDS volunteers, who worked mostly at the Ministry of Health's central AIDS bureau, and Peace Corps volunteers, who were placed mostly at the local level, undermined the AIDS programs. At one point, I was accused by the regional VSO AIDS director of forbidding hospital staff to track down clients who had tested HIV-positive but "absconded" (i.e., not returned to learn the results). Since I had no authority over hospital staff, the charge was false. Yet, if indeed true, my action would have been proper, since tracking down a client in his or her village was a violation of the hospital's and the Ministry's confidentiality rule. Attempts to resolve these problems among the various volunteer staffs proved ineffectual, and only reinforced my belief that volunteers of one nation should not work under volunteers of other nations except in very exceptional circumstances.

Problems also occurred under many volunteer doctors from Europe, who often served as heads of district hospitals. Feel-

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ing marginalized and unsupported, several colleagues decided to move their AIDS activities from the hospitals to community locations, saying it brought AIDS education and services closer to the people. In theory it sounded good, but in practice most of these community-housed AIDS programs died when the volunteers left and were not replaced. Moreover, the cultural climate in the villages, which attached great shame to having or being thought to have HIV or AIDS, meant that many people loathed to come to a public place where their neighbors would know who had what disease or who took what test. These community-based efforts attracted many local volunteers but seldom any clients.

Gearan also established a Crisis Corps to use "more experienced volunteers" to give short-term assistance to countries suffering from natural disasters or civil war. But the program's mission remains undefined, at least in practice. For example, *Hotline*, the Peace Corps newsletter for returned Peace Corps volunteers, advertised for the following Crisis Corps job: working for two Nicaraguan NGOs (nongovernment organizations) to assist a cooperative of organic growers to maximize organic yields and expand peanut production. How this fits the definition of a short-term crisis is hard to imagine.

The failure of volunteerism

The Peace Corps training philosophy is part of the program's problem. Recruits submit to an eight- or ten-week training regimen that gives excellent language instruction but otherwise relies on motivational and role-playing techniques and the workbook study of such topics as development or beekeeping or community health. The belief is that if such self-directed, experiential learning can turn out "skilled" volunteers, then it can do the same for locals regardless of culture or degree of education. Much of the training is devoted to showing trainees how to use these techniques to build in-country volunteer movements for Peace Corps programs.

Sometimes the consequences of this "self-help" philosophy are harmless. But from my various experiences they often are not. For instance, after succumbing to a lot of the "Barefoot Doctor" philosophies of China and Cuba in the sixties and seventies, the World Health Organization (WHO) and other

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international and national health agencies have done away with many disease-specific health programs such as malaria eradication. Instead, they have tried to shift health responsibilities to volunteer-run "community health councils" or "village health workers." Such councils and workers are expected, after a three-day to six-week workshop, to take over the health-care management of their communities without pay, or, if that doesn't work (and it usually doesn't) for whatever compensation the community or donors can come up with. ("Work for food" was one scheme where I was posted.)

In Chitipa, Malawi, the outcome of this scheme was as predictable as it would be if the United States, the world's greatest booster of volunteerism, tried to turn its public-health system over to unpaid volunteers: noncompliance. For two years my counterparts and I tried to get our district's chiefs, the district political officer, and other local elites to form a community AIDS council. But none of these mostly professionally trained men and women, whose credentials had not come easy in their country, had any interest in participating, especially since they would receive no pay, had no real expertise in AIDS work, and wouldn't receive any real resources to do anything anyway. They also feared (rightly) that if they did form a council, they would receive all the criticism for its failure to make improvements (and the failure rate of these community councils during my time was nearly 100 percent). These failures were almost inevitable, since neither the government nor donors intended to fund the council or its work. A sense of civic duty and volunteerism was to be the only motivation.

I would not argue that volunteerism never works, or that it can't or shouldn't be encouraged. But volunteerism in the American tradition is built on choice, and it is a fairly easy choice in our affluent society, where most of us can afford to give up some hours, or a day, or even two years of our lives to help others. And our society rewards us for this helping behavior. Taxpayers totally support the Peace Corps volunteer abroad—free travel, free housing, free medical care, monthly stipend, vacation pay, and a $5,000 resettlement bonus if the contract is completed. Other types of volunteering also earn benefits—tax breaks, time off from jobs offered by some com-

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panies, food and transport, etc.

But developing countries cannot afford this luxury, either in terms of rewarding its citizens for volunteering or in terms of expecting its economically struggling citizens to have enough leisure time to want to volunteer for free. And so, this American- and international-imposed volunteerism at the local level is usually perceived not as a choice but as what some of my Chitipan colleagues called "forced labor"—and in one case, more darkly, "slavery." There are, in addition, real costs to misguided volunteerism: inefficiency, loss of respect among the people supposedly being helped, resentment, and the often terrible waste of money and resources that, if used to pay a professional, might actually do some good rather than funding volunteers whose mission is not to "screw up."

And yet, when the Peace Corps relies on professionals, rather than amateurs, there are seldom any real jobs for them to do, since after 40 years host countries place volunteers in places where they will do the least harm. This makes for unhappy professionals, who often leave, reinforcing the Peace Corps's belief that the best volunteers are unskilled ones.

This happened to me in Turkmenistan, a country whose Soviet-styled medical system has (if the statistics are to be believed) a high ratio of professional doctors and nurses to population. When I arrived, the Peace Corps's new urban health-outreach program, which began in the early 1990s, was already seen by many in-country leaders as a failure. And so the Turkmenistan government recommended that volunteers, usually young and unskilled compared to their urban counterparts, might be more useful at health centers on the nation's collective farms.

The problem with this reassignment became immediately clear to me when no one could decide during training what to call us. Finally, it was decided that our Turkmen and Russian title should be "Doctor Propagandist." I hate to think what rupture in American-Turkmenistan relations might still occur if, called out at dawn to reattach a leg amputated in a tractor accident, a "Doctor Propagandist" declines. No doubt the locals have learned to discriminate American-style "doctors" from medical ones. A colleague who did stay on, a nutritionist, reports she has started an aerobics class to keep herself busy.

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Cultural imperialism vs. consumer choice

The vision of the Peace Corps as the vanguard of a worldwide volunteer movement remains intact, however ill-defined and ineffectual the program has been over the years. And so, even if volunteers cannot do much of anything useful or lasting—and they usually cannot—their very presence is somehow supposed to jump-start the world's poor to solve their many longstanding problems (and in the process make American youth more globally conscious). As an anthropologist, I find no other way to describe this than cultural imperialism, since volunteerism is not a cultural trait indigenous to most developing societies.

This spread of American values is precisely what the Peace Corps was created to do during the Cold War—that is, to act as a showcase of democracy at the host country's "local level." And of course, one of our most cherished values is volunteerism—so fundamental to our sometimes romantic notion of American grass-roots participatory democracy. The problem is that the ideology of volunteerism undermines what the Peace Corps claims is its core mission: "to provide trained manpower to the world's developing countries."

So what's to be done? I believe the Peace Corps must decide whether its function is to run educational and cultural diversity camps in other people's countries or, like VSO and Doctors Without Borders, to act as a placement bureau for professionals who wish to serve overseas. It can't do both.

The bottom line should be not supply but demand. What kind of volunteers, if any, do these countries want? How many do they need? And if asked, which would they prefer: the $25,000 in cash it costs to keep a Peace Corps recruit in their country for a year, or the actual, well-meaning, but unskilled volunteer himself? After all, when it comes to pushing American values, what's more American than consumer choice?

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Are nonprofit CEOs overpaid?

PETER FRUMKIN

THE nonprofit sector has acquired a black eye in recent years. Financial scandals at the United Way, NAACP, Adelphi University, and the Baptist and Presbyterian Churches have shaken public confidence in the stewardship of charitable organizations. As money flows in and out of nonprofit organizations at record levels, the question of how much their CEOs should earn has become a major issue.

One recent survey of compensation levels in 246 large nonprofit organizations found that the average salary was $207,990. Twenty-five CEOs earned more than $400,000; 114 earned between $200,000 and $399,999; 77 earned between $100,000 and $199,999; and 30 earned less than $100,000. At the high end in their respective fields were the president of Sloan Kettering Cancer Center ($1,077,500), the president of the University of Pennsylvania ($529,677), the CEO of the Cystic Fibrosis Foundation ($389,327), the general director of the San Francisco Opera ($425,000), the executive director of the American Olympic Committee ($483,665), and the Chief Scout

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Executive of the Boy Scouts of America ($388,845). At many of the organizations, an employee other than the CEO was the highest compensated, including the chairman of the cardiothoracic surgery department at Cornell University ($1,731,922), the football coach for the University of Southern California ($750,000), and the music director of the National Symphony Orchestra ($829,916). As a whole, salaries in the nonprofit sector rose slightly faster last year than those in the business sector, reflecting the belief that charities need to "catch up" with what for-profit firms pay their leaders.

For years, government largely ignored the difficult ethical and regulatory issues raised by increasing compensation levels in the nonprofit sector. In an effort to address growing concerns about the financial management of nonprofits, Congress enacted legislation bearing on nonprofit compensation as part of the Taxpayer Bill of Rights in 1996. After drafting regulations and seeking public comment, the Internal Revenue Service has now put in place a new regulatory framework to guide compensation in public charities and a system of sanctions for delinquent organizations. Yet fundamental questions remain: Are salaries in the nonprofit sector really too high? Should salaries be regulated to block the unwise transfer of charitable resources? Will the IRS's new regulatory effort succeed in controlling nonprofit compensation? It is unclear whether salaries are so high that they jeopardize the mission of charitable organizations. But what is clear is that the new regulation scheme will accomplish little.

Why regulate?

Two competing perspectives on nonprofit compensation have emerged in recent years. For some, the idea of paying nonprofit executives salaries that rival those in the business world is absurd. After all, the reasoning goes, those who choose to work in the nonprofit world do so knowing that few charitable organizations can afford generous financial rewards and that psychic pleasure is the coin of the realm. Accordingly, anyone seeking a generous compensation package should look to other parts of the economy for more lucrative opportunities. Looking at the intersection of mission, stewardship, and accountability, this side of the argument concludes that nonprofits cannot re-

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sponsibly devote substantial charitable resources to paying their employees when the same resources could in many instances be used to serve needy clients or fulfill the organization's mission.

But not everyone sees nonprofit employment as demanding a vow of poverty. Increasingly, some have argued that the nonprofit sector needs to pay its best workers competitive wages if charitable organizations are to attract and retain the most talented and capable people. Those embracing the idea of comparable pay across sectors sometimes argue that it is precisely because there is no clear bottom line in the nonprofit sector that good managers are essential. With reliable indicators of achievement hard to define in the absence of such measures as earnings per quarter, share price, and debt to equity ratio, nonprofit managers must be especially creative and resourceful in how they deploy an organization's human and financial capital. Leaders of large nonprofit organizations must be able to juggle multiple tasks and motivate both professionals and volunteers. These tasks require people with strong management and leadership skills. For this reason, compensation packages competitive with those in the for-profit sector are necessary; otherwise, nonprofits will become employers of last resort.

Why would government want to regulate how much nonprofit managers earn? Four different reasons have been offered: because existing disclosure mechanisms are flawed and unreliable; because nonprofit boards have little incentive to monitor manager salaries; because several categories of nonprofits are substantially insulated from any market test; and because, even if stakeholders diligently monitor salaries, regulation may be necessary to ensure that charitable dollars are used for public purposes.

The IRS regulatory scheme announced in 1998 reflected these different motivations. The new regulations included provisions on unreasonable compensation, a procedure for rebuttal, an intermediate sanction, and disclosure requirements. The new regulations define the old notion of an "excess benefit transaction" as one in which an economic benefit provided by a tax-exempt organization to an employee or trustee "exceeds the value of the consideration (including the performance of services) received for providing such benefit." Compensation is excessive if it "exceeds what is reasonable under all the

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circumstances." Compensation is reasonable "if it is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances." These are, however, fairly loose and porous standards, for how does one interpret the words "like enterprise" and "like circumstances"?

Because there is little case law in the tax status of nonprofits, the reasonable-compensation definition by itself would not help organizations know what was required of them. In order to allow charities to exercise their best judgment with greater certainty, Congress placed a "rebuttable presumption" in its legislation, which the IRS adopted in its regulations. Charities may rely on a rebuttable presumption that their compensation decision was reasonable if it was approved by a board that is made up entirely of individuals unrelated to, and not subject to the control of, the disqualified person; if it obtains and relies on appropriate comparability of compensation data; and if it adequately documents the basis for its salary decision.

A critical tool for strengthening managers' incentives for diligence and minimizing the effect of penalties on innocent parties is the creation of an intermediate sanction, a penalty designed to give the IRS an alternative to the ultimate sanction of revoking an organization's tax-exempt status. The intermediate-sanctions penalty is a two-tiered tax. Once the IRS determines that a charity has paid excess compensation, it imposes an initial 25 percent tax on the disqualified person who received the excess amount. This individual must not only pay the tax but also repay the amount of the excess compensation to the organization. If the individual does not repay the excess by the time the IRS mails a notice of deficiency or assesses the 25 percent tax, he is then liable for a 200 percent tax on the excess.

The new regulations will also make information disclosure fuller and easier to access. Form 990 is the annual reporting form required of all public charities except for churches and organizations whose annual receipts are $25,000 or less. Form 990 requires organizations to report the amount of their revenues, expenses, and assets and liabilities, with the expense category broken down by program, management, and fundraising. They must describe their major purpose and service accomplishments. Most relevant to reasonable compensation,

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they must disclose compensation for officers, trustees, and directors, as well as for their five other highest-paid employees; they must also report their five highest-paid independent contractors. Finally, they must disclose certain taxes and fines paid during the previous year, including intermediate-sanctions penalties. Although the law has long required charities to make their Form 990s available, organizations must now not merely make their 990s available for in-person inspection but photocopy and mail out the forms upon request or post the information on the Internet. To increase incentives for disclosure, the IRS can now impose stiff penalties for noncompliance.

Taken together, these new regulations—especially the use of intermediate sanctions—allow the IRS to pursue excess compensation more aggressively and to apply penalties specifically against those who received, or could have prevented, excess compensation. The hope is that the application of more formal penalties will reduce reliance on inconsistent and overbearing moves to revoke tax-exempt status and close nonprofits. The legislation appears to recognize the special danger that self-interested insiders pose when incentives for rigorous oversight are weak, as well as the need to discourage charity managers from making ill-informed decisions. At the same time, the regulations provide some protection to nonprofits by including a rebuttal process whereby managers and trustees can defend compensation decisions.

On the surface, at least, intermediate-sanctions legislation would appear to satisfy many of the existing problems in the area of nonprofit compensation. But allowing nonprofits to justify their salaries by comparing themselves to for-profit businesses raises serious questions about the likely effectiveness of these regulations.

The real obstacles to accountability

The new system for regulating nonprofit compensation largely depends on the idea of "reasonableness" and the opportunity for rebuttal. This approach requires a "good faith effort" on the part of nonprofits to find out what other similar organizations pay their executives. By looking at and documenting the decisions reached by others, nonprofit boards can justify their compensation decisions and protect themselves from interme-

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diate sanctions. But the universe of organizations to which nonprofits can compare their salaries includes for-profit organizations. Herein lies the fatal flaw.

All nonprofits operate under a nondistribution rule that prohibits those who control them from benefiting financially from them or distributing earnings to other parties. Bound by this promise to use their resources to advance their missions rather than to benefit private parties, nonprofits help solve what some have called "contract failure." People seek out nonprofits in situations where they cannot effectively monitor services using ordinary contractual devices, where trust and information are scarce, and where assessing the value of services they receive is difficult. A nondistribution rule provides a powerful contractual assurance that consumers will not be taken advantage of or betrayed by profit-seeking producers. The fact that profits are not allowed to be distributed to shareholders or owners gives the consumer a certain confidence that transactions will be fair.

Rising nonprofit salaries have the potential to undermine that trust. If staff salaries and directors' fees become too high, it may appear—and it may be the case—that nonprofit workers and trustees are siphoning off organizational resources for their own private advantage, which, for all intents and purposes, is equivalent to a "distribution" of "excess revenue." This kind of distribution through salaries and fees, rather than through the payment of dividends, creates several problems. First, it weakens a community's confidence in the motives of nonprofit workers and weakens support for nonprofits' tax exemption. Second, it shakes the confidence of clients because the motives of the providers are different when the constraint of profiteering is lifted. Third, it undermines the ability of donors to assume a link between the size of their gift and the amount of charitable services delivered. In other words, clients of nonprofits and their donors as well as the larger community are all affected by a violation of the nondistribution rule. And thus some limits on compensation are needed if nonprofits are to respond successfully to contract failure.

It is not clear how new compensation regulations will prevent violations of the nonprofit nondistribution constraint. Consider the case of large nonprofit organizations. The nonprofit

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sector has grown over the years to the point where many large nonprofits, such as the Salvation Army, the YMCA, Catholic Charities, and the American Red Cross, have annual budgets of $2 billion or more and employ tens of thousands of people. But since there are few such large nonprofits, the question is what the salaries of their leaders should be. Under the new regulations, an organization like the American Red Cross could argue that, in making compensation decisions, it should compare its executive salaries with those of a $2 billion service corporation, rather than look only to the small pool of other large nonprofit organizations. It might even enlist an independent compensation expert to support this move and to document that the main competition actually comes from the fast growing for-profit blood banks. If the executive the Red Cross wanted to hire were recruited from business, as many of the senior managers in the blood-services division have been, this would appear to be not only a permissible action but a responsible one. In building its case, the Red Cross might well begin its search process by assembling a list of what business managers in large biotech and health corporations earn, which most likely would help justify extraordinarily generous compensation packages.

The problem is that cross-sector comparisons are often subjective. In the case of the Red Cross, the "comparable list" would have to take into account both the salary paid to senior business managers and the stock options that are part of many compensation packages. In many corporations, a senior executive's stock options can often amount to millions of dollars of deferred compensation. For example, Disney CEO Michael Eisner's stock options have in recent years approached $200 million. In many small and mid-sized companies, stock options, though smaller in dollar terms, remain a critical tool for motivating and retaining senior managers. Moreover, researchers have shown that for-profit executive salaries are increasing even though the relation between compensation and performance is not clear.

The problem with cross-sector comparisons is not limited to compensation decisions in large public charities. While small nonprofits do not appear to have corporate equivalents, it could be argued that their organizations are analogous to small

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businesses. In both cases, the work is entrepreneurial, involves the mobilization of resources, and often demands supervising a small group of workers. Again, however, there is the question of whether profits paid to small business owners can be applied in the nonprofit context.

By allowing for comparisons with the for-profit sector, the new regulations threaten to undermine the fragile identity of public charities as service and mission-driven organizations. If every major hiring decision in the nonprofit sector encourages scrutiny of comparable hires in other organizations, including those in the corporate world, it is unlikely that groups like the Salvation Army and Catholic Charities would be able to recruit and retain their presidents while paying them only $77,754 and $95,227 respectively in 1998. The Salvation Army has long had a reputation for frugality, and the levels of compensation it pays most of its senior managers can only be described as meager. For some nonprofits, low wages are part of their identity and a critical reason why clients trust and believe in them. Clients and donors are attracted to organizations that spend most of their money on charitable programs rather than on compensation and perks for employees. Yet with one regulatory move, the IRS has hoisted a carrot on a stick, dangled it in front of charity boards, and thereby battered a critical part of nonprofit identity.

Ironically, far from eliminating or discouraging financial abuses, the new rules may pressure nonprofits to pay "comparable worth," thus increasing salaries. As boards begin to consult studies of what other organizations pay and what businesses offer to their executives, it is possible that there will be a slow but steady regression to the mean. Concerned with not paying too much, nonprofits may collect data on what others are doing and gravitate toward what they believe is the mean salary for a given position. But while there is nothing inherently wrong with paying the mean salary, it may often be that a charity could have hired someone who would have done the same work for less money.

Regulating through information

What then should be done? The best strategy for effectively regulating and preserving the nonprofit sector is to cre-

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ate a reliable supply of information about the financial management of charities and to encourage donors, clients, and the general taxpaying public to make use of it. By opening up nonprofits to public examination and empowering stakeholders with information that can help guide their contributions and use of services, it may be possible to improve accountability.

Making IRS Form 990s easier to access is a good start, but it is not the only alternative. Some critics of nonprofits have long argued that only the creation of independent accrediting agencies will increase information. Watchdog organizations are needed not only to collect data but also to analyze it and explain it to the public. Independent accrediting and oversight agencies have in fact been established in certain areas, though the results have been mixed. The Better Business Bureau, for example, reviews charities' compliance with standards regarding (among other things) using a high percentage of funds for program activities, having active governance, and providing complete and accurate information to donors and potential donors. It also catalogues government action against national charities. The National Charities Information Bureau acts as a kind of accreditor for charities by collecting information on nonprofits and reporting which organizations have complied with requests for information and which have not. Such voluntary systems rely on the good will of charities both to provide information and to record data accurately. The main problem with this approach is that it does not effectively monitor the organizations that ignore requests for information.

As a result, some argue that the only real solution to the accountability problem in the nonprofit sector—and the narrower question of compensation—may lie in the establishment of an SEC-type organization that could ensure openness and disclosure. This would be a way of "regulating through information." The principal role of an SEC for nonprofits would be to bring uniform accounting techniques to public charities, disseminate information on the financial condition of organizations, and create channels through which donors, volunteers, clients, and community members could access and use this information. Of course, this would be a far more complex proposition in the nonprofit sector, where lines of ownership are overlapping and ill-defined, than in the business sector,

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where one group of owners, namely shareholders, have clear interests in solid information. For such a strategy to work, a major transformation would be needed not just in the kind of information made available but in the outlook of nonprofits' many stakeholders.

There is at least one major development on the horizon that may help significantly improve the supply of information. A new nonprofit organization has been formed to disseminate financial information on nonprofits over the Internet. The project, known as GuideStar, is still in its early stages, but it promises to overcome at least part of the information problem. The GuideStar website will allow any person to access the essential financial data for a large number of nonprofit organizations. Information about operating expenses, administrative overhead, and fund-raising costs will all be available to potential contributors and volunteers. The goal of the project is to make research on nonprofits easier for the average donor by putting this data where it is easiest to access.

The responsibility of stakeholders

To make the idea of "information as regulation" a success, the public must take a more active interest in the activity, leadership, and direction of nonprofits. Although nonprofits do not have owners, they do have important stakeholders. These various constituencies (donors, clients, and the general public) all have an interest in the compensation issue, and each is affected differently by charities that compensate excessively. Clients may be hurt because excess salaries drive up the cost of services and make the use of nonprofits less attractive. Donors may be hurt because less resources are used for the charitable programs they support. The public is hurt because tax dollars are not being used in ways that most help the community.

Over the past two decades, earned income—revenues derived from client fees or commercial ventures—has quietly become a central part of nonprofit revenue. While there are still some nonprofits that depend entirely on charitable gifts, the vast majority rely in part or in great measure on revenue from fees and other commercial activities. The clients of nonprofits look more and more like consumers. But because

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many nonprofits engender trust and are often viewed as community resources, it is rare that clients ask tough questions before using charitable services.

A different set of problems besets charities mostly dependent on donations from foundations, corporations, federated funders, and individuals. Institutional funders have long studied the financial statements of nonprofits during the grant review process. At times, some foundations have aggressively demanded management reforms in the organizations that they fund. This oversight is limited in impact and scope, however, because the vast majority of giving is done by individuals, not by the more visible institutional givers. According to research, individual contributors typically support organizations that they have had contact with in the past or that work in their local communities. Donors are particularly attracted to universities they have attended and to their community hospitals. Contributions are a way for individuals to act on their values and commitments, and to help causes that are important to them. Such contributions rarely reflect careful consideration of a charity's financial statements.

Within neighborhoods and communities, public charities are often viewed as critical resources, especially in areas where business investment is low and where public programs are lacking. Even in the most organized and politically engaged communities, however, few residents watch over the local nonprofits. Some community members may become involved in an organization, sometimes by serving on an advisory board or volunteering. Nevertheless, it is rare for members of the general public to oversee actively the operations of community nonprofits. Communities may want charities to act as good citizens, but rarely do they ask questions about compensation decisions or attempt to shape them by applying political or moral pressure.

Occasionally, clients, donors, and communities have taken an active role in improving charities. The recent history of the United Way provides perhaps the best example of donors reshaping an organization through the combination of pressure and the withholding of funds. Following the scandal that led to the jailing of its president, the United Way experienced a significant drop in the amount of funds it collected within

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many of its critical chapters. Many faithful donors to the organization demanded change and greater accountability for the use of their charitable dollars. Responding to this pressure, the United Way gave contributors more options, including the ability to pick beneficiaries, and instituted a rigorous evaluation program for grants. Of course, these reforms only occurred after a national scandal brought enormous publicity to the organization. But it is clear that nonprofits can and do respond to stakeholder pressure.

A new relationship

A system to keep stakeholders informed would help hold charities in check before scandals and problems occur. By contrast, placing primary responsibility for the oversight of nonprofit compensation with the IRS is unlikely to solve the accountability problem.

Among public charities that depend on income from clients or contributions from donors, there is an opportunity to create a self-regulating system anchored in both a greater supply and demand for information. For this system to work, major changes would be needed in the way clients, donors, and communities view their relationship with charities. Clients would need to realize that the way nonprofits are managed impacts directly the quality and cost of the services rendered; they would have to view nonprofits less as vendors and more as partners. Donors would have to stop thinking of their contributions as simply symbols of their goodwill and begin to take an active role in overseeing how their gifts are used. Finally, communities would need to take an active interest in the governance and management of local charities. This may mean opening the governance systems of nonprofits not just to wealthy and influential citizens but to a broader cross-section of people interested in, and committed to, an organization's cause. What is needed is a change in the dominant culture of the nonprofit sector, where performance and outcomes too often play second fiddle to commitment and mission.

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Moynihan's legacy

JEFFREY O'CONNELL & RICHARD F. BLAND

As the new century begins, the career of the man whom the *Almanac of American Politics* calls "the nation's best thinker among politicians since Lincoln and its best politician among thinkers since Jefferson" comes to a close. Retiring in 2001 from a coveted Senate seat, Daniel Patrick Moynihan and his career were at least temporarily overshadowed by the race to be his successor. Perhaps in an anticipatory move to stem such a tide of attention, Johns Hopkins University Press has published *Daniel Patrick Moynihan: The Intellectual in Public Life*,† a probing, while highly celebratory, compilation of essays about Moynihan from authors in fields as diverse as Moynihan's accomplishments. (This book has been strangely overlooked by reviewers, especially in contrast to the widespread and immediate attention devoted to a later Moynihan biography by Godfrey Hodgson.) The 12 authors range from former Senator Bill Bradley writing on what it's like to serve with Moynihan, to Nathan Glazer on Moynihan's contribution to the concept of ethnicity, to NBC's Tim Russert on Moynihan's "wit and wisdom" as seen through his 25 appearances on "Meet the Press." The compilation not only catalogues Moynihan's accomplishments but also explores what it is about Moynihan that has enabled him to be on the vanguard of so many modern issues, and examines why, in a time of bitter partisanship, Moynihan is arguably the most widely respected Senator on both sides of the aisle.

A consistent theme throughout Moynihan's career has been his singular ability to reframe the debate on a given public-policy problem by relying on data, not ideology, and to do it all with such wry wit and eloquent wisdom that it cannot escape one's attention. This unique skill, however, has proven to be not only his greatest asset but also his biggest encum-

† Johns Hopkins University Press. 224 pp. $26.95.

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brance. A social scientist's strict reliance on data over a 50-year career means that Moynihan's party allegiance to a new proposal, or his role as policy *maker* (not just policy critic), frequently gives way to a principled, if often frustrating, insistence on relying only on what is known about solving a problem, and more importantly, acknowledging what remains unknown.

Moynihan himself summed up his approach in a July 1993 letter on his misgivings about President Clinton's early welfare proposals. The letter could well have described Moynihan's differences with Clinton over any number of issues (most particularly health care) as well as differences with other politicians throughout his career:

> In the last six months I have been repeatedly impressed by the number of members of the Clinton administration who have assured me with great vigor that something or other is known in an area of social policy which, to the best of my understanding, is not known at all. This seems to me perilous. It is quite possible to live with uncertainty, with the possibility, even the likelihood that one is wrong. But beware of certainty where none exists. Ideological certainty easily degenerates into insistence upon ignorance.
>
> The great strength of political conservatives at this time (and for a generation) is that they are open to the thought that matters are complex. Liberals have got into a reflexive pattern of denying this. I had hoped that twelve years of denying this [during Republican presidencies] might have changed this; it may be it has only reinforced it. If this is so, current revival of liberalism will be brief and inconsequential.

Being celebratory, the *Festschrift* volume is in no way an objective critique of Moynihan's work. The book's value lies instead in its description of the breadth of Moynihan's career, the successful predictions he has made in so many areas of policy, and the legacy he will leave behind.

Largely overlooked by the essays are Moynihan's critics. From the Left, there has been the refrain that Moynihan's chosen role as strict adherent to data and principle and somewhat pessimistic approach to social policy have been a cover for laziness in actual legislating. As Hanna Rosin in *New York* magazine put it, adhering to "principles ... [got] him and New York nowhere." From the Right, critics argue that Moynihan, once viewed as a neoconservative, only gives the "appearance of independence, then retreat[s] to the party." He has thus traded conservative "principle after principle for a cozy life in an unthreatened seat" from a largely liberal state. Who is

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right? Moynihan somehow manages to offend both political extremes, while nevertheless retaining the respect of his peers and the electorate.

Renaissance man

The intellectual in public life, common at the founding of the American Republic, is much rarer today. In the *Festschrift*'s introduction, editor Robert Katzmann explains this absence of the scholar-politician as a result of what Richard Hofstadter termed the modern intellectual's struggle between "alienation and conformity." Katzmann writes:

> On the one hand, ... [intellectuals] seek acceptance of their ideas; on the other hand, they believe that fierce critical detachment, indeed alienation, is necessary for the exercise of their creative juices. For the intellectual in politics, life is lived on a slippery tightrope, on which balance is difficult to maintain for very long.

Moynihan has thrived on this tightrope and has maintained his standing at the acme of both the political and academic arenas. From the book's appendix one notes that Moynihan is the recipient of *sixty* honorary degrees and such prestigious academic awards as the Thomas Jefferson Medal of the American Philosophical Society and the Britannica Medal for the Dissemination of Learning.

As an example of his striking a precarious but successful balance between scholarly pursuits and political survival, take Moynihan's original choice of committee assignments in the Senate. As recounted by Michael Barone, Moynihan said he chose Finance, "because that's where the money is." Moynihan's assignment on Finance allowed him to help control the vast flows of money in and out of the Treasury as well as to frame the debate on some of the most vexing social-policy issues of the day, many of which (taxation, welfare, Social Security, and Medicare) came within the committee's bailiwick. Moreover, his other committee assignment—Environment and Public Works—enabled Moynihan to maintain his dedication to reforming transportation policy and to delivering significant public-works projects to every county in New York (not to mention indulging his aesthetic passion for encouraging superior architecture in federal buildings).

These accomplishments have not prevented Moynihan's left-wing critics from complaining that he "was an idealist and controversialist, a theory-bound professor who enjoyed argu-

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ment and relished grand gestures in defeat." Barone in his essay acknowledges that there may some truth to this claim. "But Senator Moynihan has also been a skilled legislative politician, capable of building a consensus around ideas, marshaling support in committee, assembling a coalition, seizing the right moment to take a measure to the floor."

Other essayists in the book add to the list of legislative achievements by noting Moynihan's role in passing the Social Security Amendments in 1983 with Senator Bob Dole, the Tax Reform Act of 1986 signed by President Reagan, and, in arguably Clinton's most seminal accomplishment, ushering the Deficit Reduction Package of 1993 out of the Finance Committee and on to passage by one vote in the Senate—the deciding vote being cast by Moynihan's friend Bob Kerrey after a fabled call from Liz Moynihan. Even so, Moynihan is known for his distaste for lobbying other Senators in the causes he believes in.

More evidence that Moynihan was a skilled politician, not just an idealist, can be found in his continuous reelections. In 1988, he received the highest vote total for any candidate for statewide office in New York State history; he also received the largest margin of victory in U.S. Senate history, winning 61 of 62 counties. In 1994, he defied the nationwide anti-incumbent, anti-Democratic mood, and became only the third New Yorker ever elected to four terms in the Senate. If Moynihan has benefited consistently from a lack of credible Republican challengers (State Assemblywoman Florence Sullivan in 1982, after former congressman Bruce Caputo withdrew; Long Island attorney Robert Macmillan in 1988; and furniture-fortune heiress Bernadette Castro in 1994), this can be seen as a testimony to Moynihan's strength, not necessarily Republican weakness. For example, in 1988, the 29 possible Republican opponents who bowed out at some stage of the Senatorial campaign included U.S. attorney Rudy Giuliani, Representative Jack Kemp, and former secretary of state Henry Kissinger.

The social science of race

As to Moynihan's consistent, historical reliance on data and the limited, if crucial, role of social science in policy making, Seymour Martin Lipset, in his essay "The Prescient Politician," best encapsulates this little understood but critical element of Moynihan's beliefs:

> [Moynihan] argued that social science rarely comes up with sufficient evidence to provide a scientific underpinning for broad policy

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> changes, whether presented by liberals or conservatives. Research generally sustains the null hypothesis—that is, not proven. He, therefore, laid down the dictum, which has become highly controversial, that "the role of social science lies not in the formation of social policy, but in the measurement of its results." Then and later he argued that while social science "can call attention to some probable consequences of certain types of actions," it cannot and should not formulate policy.

Moynihan maintained that a responsible politician must acknowledge both the history of findings on the subject and the limited nature that policy change can have on changing human behavior like illegitimacy—no matter what the political sentiment at the time.

Here some background may be helpful: In his 1965 report, "The Negro Family: A Case for National Action," (better known as "The Moynihan Report"), Moynihan had taken pains to point out that family structure is sensitive to variables of family income and employment. He was blaming not the victim but what he termed a "tangle of pathology." The authors of the most extensive and objective account of the Moynihan Report, William Yancey and Lee Rainwater, pointed out that oversimplification by the press was the central cause for the outrage that followed: "Taken as a whole, the effect of the press coverage of the Moynihan Report was to subtly exaggerate the already dramatic and sensational aspects of Moynihan's presentation and as a result to considerably deepen the impression that the report dealt almost exclusively with the [Negro] family, its 'pathology,' and 'instability,' as the cause of the problems Negroes have." Thus one finds William Ryan, a psychology professor at Harvard Medical School, in the most widely distributed reaction to the Report, writing in both the *Nation* and the *Crisis* (a publication of the NAACP), that Moynihan's report "encourages a new form of subtle racism."

According to Lipset: "Only in the longer treatments of the report, or for the careful reader (which no journalist can count on) of some of the shorter articles, was there any clear communication of the vicious cycle with which Moynihan sought to deal." Lipset then does an admirable job in clearing up the confusion:

> [Moynihan] did stress the higher rates of family instability and illegitimacy among African Americans, which, he emphasized, contributed strongly to the inability of many black youth to perform well in school and in the labor market. But, as noted, family conditions are intervening variables. The causes of instability lay,

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> according to Moynihan, in external social factors and economic conditions ... clearly he was not blaming the victim; he was blaming the society, the white society.

But the Left turned on Moynihan—and not only because of the 1965 report on the Negro Family but also because of a second incident four years later. In 1969, Moynihan wrote a confidential, but leaked, memorandum to President Nixon, encouraging him to allow the heated racial rhetoric in the nation to cool down:

> The time may have come when the issue of race could benefit from a period of "benign neglect." The subject has been too much talked about ... We may need a period in which Negro progress continues and racial rhetoric fades.
> [The administration] should avoid situations in which extremists of either race are given opportunities for martyrdom, heroics, histrionics, or whatever.

According to Moynihan, the term "benign neglect" came from the nineteenth-century British minister Lord Durham in his 1849 report to Queen Victoria on how to quell the divisiveness between French- and English-speaking Canadians in Upper and Lower Canada. (It should be noted that after six months of research, including an aide being assigned to read the entire "Durham Report of 1849," no such phrase "benign neglect" could be found.) Moynihan had been arguing for three years that similarly divisive rhetoric in America from both the Right and the Left was making racial progress more difficult. He was worried about such rhetoric heating up and vindicating anger and unrest in the black community. Again, Moynihan in the memo:

> With no real evidence I would nonetheless suggest that a great deal of the crime, the fire-setting, the rampant school violence, and other such phenomena in the black community have become quasi politicized. Hatred, revenge against whites, is now an acceptable excuse for what might have been done anyway.

But "benign neglect" as a phrase lost any historical context and was instead heard by a civil rights leadership, already skeptical of Moynihan after the 1965 Negro Family Report, as an abandonment of the plight of poor blacks. Moynihan responded that he was merely seeking to dampen the rhetoric by paying less attention to the extremes, while quietly maintaining important governmental efforts on behalf of poor blacks through a dialogue with more stable and respected black lead-

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ers. Indeed, one month prior to the memo, Moynihan had adamantly maintained that "poverty and social isolation of minority groups is the single most urgent problem of the American cities today." But Moynihan's choice of phrasing, especially the word "neglect," was seen as insensitive.

However wise or unwise the counsel of a period of "benign neglect" may have been, Moynihan worried (and still worries) that the two incidents "ruined him in the Democratic party." So pained was he by the Left's attack on him that the 1965 report and the "Benign Neglect" memo are the only major topics that neither reporter nor staffer can broach with Moynihan even today. Furthermore, in perhaps a nod to this wound, the essayists in the *Festschrift* also avoid discussing the notorious memo to Nixon. For a loyal man like Moynihan, losing the faith of the most liberal elements in his own party twice in four years was devastating, and the accusations of racism from those on the extreme Left meant that he could never fully trust them again.

One and a half cheers from the Right

The criticism from the Right in Moynihan's career has been from those who see a betrayal by one of their own. After all, Moynihan had been a post-Woodstock neoconservative in the 1970s; indeed, he was an original member of the publication committee of *The Public Interest*. But as Jay Nordlinger wrote to his fellow rightists in *National Review*, "[Conservatives] like him personally (as who apparently could not?). But they speak virtually as one in lamenting the course of this former golden boy, a figure so dazzling, so energetic, so capable, that some allowed themselves to dream of a second Jefferson in the White House." But three factors consistently kept Moynihan from swaying too far to the right: his upbringing, the *New York Times*, and old-fashioned Democratic loyalty.

According to William Yancey and Lee Rainwater, Moynihan's core dedication to a social safety net was a product of his Hell's Kitchen upbringing and his steadfast Catholic beliefs. For political survival, Moynihan has also never strayed far from the left-leaning *New York Times* editorial page—the result of his witnessing its power after gaining its endorsement in his original 1976 narrow victory over Bella Abzug in the Democratic Senatorial Primary.

Parenthetically, the *New York Times*'s decision to endorse Moynihan had been controversial enough to split John Oakes,

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the editor of the editorial page who favored the ultra liberal Abzug, from "Punch" Sulzbeger, the *Times*'s publisher and Oakes's cousin. Oakes considered resigning and would write in retrospect, "I damn near died," characterizing Moynihan as "that rambunctious child of the sidewalks of New York." Moynihan barely won the primary with 36 percent of the vote to Abzug's 35 percent. In the most important political race of Moynihan's career, the *New York Times* had essentially cast the deciding vote. Moynihan staffers would learn of his reverence for the paper "of record," as he called the *Times*, when they would futilely try to convince Moynihan that four or five "mentions" in upstate newspapers could on occasion be equivalent to one mention in the *Times*. To Moynihan, the national statesman, absence from the *Times* was paramount to being absent from the debate.

Moynihan's alliance with, and reverence for, the *Times* reflects his steadfast belief in loyalty to those who helped him along the way. This characteristic, incidentally, helps answer criticism from those who might think "Moynihan the Scholar" has no allegiances. As Bill Bradley recounts in his essay in the *Festschrift*:

> I asked ... [Moynihan] once, "Are you staying with the labor guys on trade again?"
> He said, "Yes."
> I said, "Why?"
> He said, "Because they were with me in 1976 when I needed them."

But whatever their misgivings, conservatives have generally respected Moynihan for his acute appreciation of history. The editor of the *Festschrift* cites George Will on why Moynihan is essential for national politics:

> [Moynihan] is at the top of the short—the very short—list of indispensable senators. They are indispensable in part because they do important things that would not get done if they were not there.... And in a town that is, in matters of the mind, constantly inventing the wheel, he supplies an unrivaled sense of intellectual and institutional history.

He's all that

Beyond Moynihan's belief in history as prologue, his reliance on data, and his loyalty to his Democratic party roots, the *New York Times*, and his Catholic faith, there is the immea-

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surable and inimitable appeal of his style. At a time when few Senators are known for their wit, off-the-cuff remarks, or a courageous willingness to speak candidly, Moynihan shines in liberal and conservative circles alike. Nordlinger cites two critics who answered why Moynihan remains the liberal politician whom conservatives love best. "Style," said one, "he's a glittering dinner companion, an astounding intellect, whose knowledge is unparalleled"; another added, "He's one of us. He's not Al D'Amato; he's a professor. It's a little like the *New Republic*: they have a thousand interesting things to say, even if they wind up—you know—being for Mondale." This style has been Moynihan's trademark throughout his career. Steven Hess recounts President Nixon at Moynihan's departure from his administration: "I disagreed with a lot of what he said—but he certainly did light up the place!"

One example of Moynihan's style was his response to an unveiling of a new and expensive governmental edifice:

> In the Spring of 1981, construction was nearing completion of the ... Hart Senate Office Building. All winter, the scaffolding had been sheathed in heavy plastic against the weather to allow the exterior marble to be installed. One day, the plastic came off. Moynihan promptly introduced a resolution: "Whereas the plastic cover has now been removed revealing, as feared, a building whose banality is exceeded only by its expense; and Whereas even in a democracy there are things it is as well the people do not know about government: Now, therefore, be it *Resolved,* That it is the sense of the Senate that the plastic cover be put back."

This anecdote also highlights Moynihan's seminal influence on architecture. He was centrally involved with the renovation of Union Station and Pennsylvania Avenue in Washington, D.C., as well as Grand Central Station and Pennsylvania Station in New York—the last of which his New York senatorial colleague Charles Schumer has proposed naming after Moynihan. In the Spring of 2000, Moynihan was the first non-architect to be honored by the University of Virginia with its Thomas Jefferson Architectural Award.

The Moynihan mode, combining a wit's style with a scholar's approach, may have attracted criticism from the political extremes but, in the end, was his greatest asset. Furthermore, Moynihan's scholarly detachment was never likely to change. Stung by both sides in his career, he always kept a reminder of this history in the most private area of his Capitol office. In his washroom hung two magazine covers: one, a 1979 issue of the *Nation* entitled "The Conscience of a Neoconservative,"

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and a 1981 issue of the *New Republic* titled, "Pat Moynihan, Neo-Liberal."

Futurologist

Then there is Moynihan's prescience. Based on his understanding of the influence of ethnicity in international politics, Moynihan realized early on that neither the Soviet Union nor Marxism elsewhere could ultimately succeed. As Nathan Glazer writes: "Others had to discover [after Moynihan] that the prospect of workers joining together across ancient or even not-so-ancient national and ethnic boundaries to advance common class interests was generally a chimera."

As long ago as November of 1979, in a *Newsweek* issue dedicated to the upcoming decade of the 1980s, Moynihan was asked, "What does the new decade have in store for America and the world?" He replied: "The Soviet empire is coming under tremendous strain. It could blow up." Pointing to an actual decline in productivity, a horrific rise in Soviet mortality rates, and most importantly, ethnic nationalism, Moynihan predicted the Soviet Union's demise. Despite Moynihan's spending the 1980s on the floor of the Senate doggedly adhering to this refrain, few were ready to concede come 1989 that he had been on the mark all along. One exception, however, was Henry Kissinger, who wrote him in 1992, "I stand corrected. Your crystal ball was better than mine."

The subject of subsequent vindication raises again the "Moynihan Report of 1965." Unfortunately, it took a sustained growth in illegitimacy for Moynihan's critics to recognize the validity of the findings in his report. The proportion of black children born out of wedlock today is near 70 percent. Both the African-American leadership and many liberal scholars now recognize that Moynihan was right, and acknowledge the need to deal with family dysfunction.

In 1993 Moynihan was out front again, coining one of the single most popular phrases of the 1990s, by titling his *American Scholar* article "Defining Deviancy Down." Basing his theory on sociologist Kai Erikson's work, Moynihan wrote that "we have been redefining deviancy so as to exempt much conduct previously stigmatized and also quietly raising the 'normal' level in categories where behavior is abnormal by any earlier standard." Moynihan then used the essay as the basis for a much publicized speech in New York City during his 1994 senatorial campaign, declaring that there should be a new

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intolerance of petty crimes. Society had defined deviant behavior to be merely violent crime, he argued, thereby causing an escalation of all manners of crime, and a subsequent deterioration of city life. George Kelling's book *Broken Windows* and New York police commissioner William Bratton would build on Moynihan's theory. New York was subsequently blessed with an enormous decline in crime rates. Moynihan's phrase became a rallying cry. A recent Lexis-Nexis search of all news media revealed 420 mentions of "defining deviancy down" in the first half of 1999 alone.

But Moynihan can be prescient not only on the large social issues but also on such obscure technical issues as tort reform—but here, as always, with an insightful twist. Litigating car accidents, Moynihan long ago pointed out, required a complicated examination of fault that more often than not provided little compensation, didn't discover who actually was at fault, and drove up the price of auto insurance. Or as Moynihan would later put it, using the courts to sue over car accidents was like "litigating the common cold."

Moynihan has recently introduced federal legislation (largely based on work by the senior author of this essay) that would give motorists the option of choosing not to sue or be sued based on fault for pain and suffering damages after auto accidents. In return, they would be assured of payments regardless of fault for their medical expenses and lost wages and at a much lower annual premium. The savings, according to a Congressional Joint Economic Committee Study, could amount to as much as 24 percent of auto insurance premiums nationally or $35 billion a year.

Whence then the opposition? Obviously, trial lawyers stand to lose: Auto crashes mean billions of dollars for claimants' lawyers annually. The influence of personal injury lawyers on Democrats is especially pervasive—but not on the notoriously independent Moynihan, who was one of only three Democrats (including Joe Lieberman) in either the House or Senate to take on the tort bar on this issue so far.

It is important to note that Moynihan's approach to reform would not, like so many left-wing proposals, simply expand tort law by increasing personal injury claims; nor would it, like so many conservative initiatives, simply make it harder for injured parties to get payment or pay them less when they do get it. Rather, the quid pro quo under Moynihan's type of balanced reforms, including one for medical malpractice claims, is that every person who gives up the common law's claims for

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higher damages, with all their disputation, receives lesser but prompt automatic payment of out-of-pocket losses, just as with workers' compensation.

With genuinely balanced civil justice reform, Moynihan, as with other issues in his career, has been able to see "old things in [a] new light and show the way to the future." Now, it will be up to his successors to follow his path of uncovering hidden truths on which to base beneficent public policy.

The statesman

If Moynihan's *Festschrift* has its shortcomings—namely, some gaps in an objective discussion of Moynihan's entire career—it nonetheless is a justifiable celebration of an extraordinarily distinguished public servant. Senator Moynihan will, no doubt, have some notable and influential pronouncements in his remaining years. But regardless of such future efforts, this *Festschrift* will admirably serve those who seek to chronicle or perhaps emulate the career of a man who is fond of reciting from memory on the floor of the Senate the oath of ancient Athens:

> We will ever strive for the ideals and sacred things of the city, both alone and with many;
> We will unceasingly seek to quicken the sense of public duty;
> We will revere and obey the city's laws;
> We will transmit this city not only not less, but greater, better and more beautiful than it was transmitted to us.

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Lincoln's America

WILLIAM A. GALSTON

JOHN Patrick Diggins doesn't fit neatly into the usual categories. He is pungently impatient with successive waves of academic radicalism—"Frankfurt School Marxism," "postmodernism," "civic republicanism," "multiculturalism," and "neopragmatism," among others. He favors a patriotic, though not uncritical, nationalism and insists that Western civilization is the source of what matters most about America. All this has led many to believe that Diggins is some kind of conservative. But he isn't. He is scathingly critical of contemporary conservatives for what he sees as their misplaced nostalgia, near-total misunderstanding of American history, and Reaganite triumphalism.

Diggins is a liberal, but of an unfashionable sort. His latest book, *On Hallowed Ground: Abraham Lincoln and the Foundations of American History*,† can be summed up in one sentence: Louis Hartz, the late Harvard professor, was right when he argued that the absence of an entrenched feudal aristocracy in America meant that, politically speaking, Lockean liberalism was dominant from the beginning of the Republic. In Part III of Diggins's book, titled "Class, Gender, Race: The Hidden Consensus," he extends this historical analysis to the insurgencies of workers, women, and blacks. In each case, he argues, the central political aspirations were liberal rather than radical; the drive was for full inclusion in, rather than fundamental transformation of, the liberal society and state.

By "Lockean liberalism," Diggins means something precise: "a body of ideas that regards matter and property, comprehended by mind and conscience, as elementary and irreducible realities and views liberty and natural rights as the means by which happiness is pursued and freedom protected." In Diggins's interpretation, Abraham Lincoln was our greatest Lockean be-

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cause he propounded a political philosophy based on self-ownership and on property earned through dignified labor. Because each individual owns himself, no one can rightly own another; because each creates value through labor, no one can rightfully appropriate the fruits of another's labor without his consent.

FOR Diggins, this Lockean outlook is not a matter of past history but remains our fate up to the present day. Yet it is a fate against which many Americans—especially intellectuals—continually struggle. They consider America's material acquisitiveness to be low, even "embarrassing." Their efforts to find practical alternatives to liberalism stem in part from the desire for a society in which virtue and matters of the spirit are more central. In so doing, Diggins argues, they overlook the possibilities of elevation inherent in Lockean liberalism. The devotion to natural rights makes it possible for every American to lead a "life of principle." The commitment to earned rather than inherited or appropriated standing leads to an understanding of work not just as a necessity but as a vocation as well. It was Lincoln who brought together these strands of Lockeanism—natural rights principles, free labor, individual opportunity—into a "sublime" statement of the moral potential of American life.

For the most part, Diggins is a fair-minded (if often cutting) critic of contemporary efforts to get beyond liberalism. But it appears that he has been driven to distraction by one of these efforts—the revival of civic republicanism—so as to lose his analytical balance. Two examples must suffice. Against the civic republicans, he insists that the Framers devised a government that had "no need to rely on the illusion of reason and virtue." The authors of *The Federalist* would not agree. They argued for institutional devices to compensate for the weakness of wisdom and virtue, but they also noted that we cannot get along without the latter. Legislation, they argued, requires rational deliberation; the Constitution itself is a product of reason and choice; and republican government presupposes virtue to a greater extent than does any other form. Second, because civic republicans give pride of place to the civic sphere over the economic, and to collective self-determination over individual striving, Diggins does just the reverse. Neither stance will do. While it is true that liberal constitutionalism creates space for individual striving outside of politics, it is not the case that liberal polities can remain healthy when the habits of

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citizenship are weak. Lincoln certainly didn't think so.

DIGGINS claims that he is writing as an intellectual historian dedicated to restoring an accurate understanding of the American experience. While this is true, it is not the whole truth. Amidst the trenchant criticisms of contemporary academic-political follies, it is hard for the reader not to hear a note of advocacy. But what, exactly, is Diggins *for*?

One might think that he is recommending a return to Lincoln's understanding of Locke. But that misses the complexity of his analysis. He follows many social theorists of the past two centuries—Tocqueville, Weber, Veblen, and Lasch chief among them—in seeing the life lived along Lockean lines as inherently unstable. Self-interest rightly understood has a tendency to yield to untrammeled egoism. The desire for equality and the need to check the concentrated power of corporations can lead to ubiquitous, stifling bureaucracy. In conditions of plenty, the dignity of labor is overlaid with the excesses of consumption. Worst, Lockean self-ownership degenerates into indifference to others, the withering away of human connection—that is, into the "culture of narcissism." Diggins honors Hartz and Lasch, among others, because they agonized about the deficiencies of liberalism without offering slick political solutions.

What force is strong enough to hold out any hope of counteracting these impulses toward liberal degeneration? Tocqueville is hardly alone in pointing to the crucial role of religion in America. Diggins has long insisted that Locke offers a necessary, but not sufficient, basis for understanding Lincoln's incomparable greatness. Lincoln's Second Inaugural is the most sublime utterance of any American public figure ever because of its matchless articulation of God's justice, mercy, and mystery. In what is perhaps his best-known work, *The Lost Soul of American Politics*, Diggins argues that political thought based on the clash of self-interest and power remains "morally empty" if it lacks the "insights of Christianity":

> The pride of virtue and power gives way to compassion and forgiveness, righteous judgment to the finer sentiments of sympathy and hope for all humankind shouldering the inevitable moral burden of sin and guilt. Without forgiveness, the highest expression of love, there can be nothing but brutal victory and cruel defeat—the only real lessons of power.

It is no accident that Diggins identifies the Christian liberal

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Reinhold Niebuhr as one of his heroes and begins *The Lost Soul of American Politics* with an extended quotation from Niebuhr.

DIGGINS is hopeful that the religious dimension of Lincoln's public philosophy remains alive today: "His speeches on responsibility and moral obligation ... continue to provide us with a conscience capable of feeling sin and guilt." The anxieties about power and success that we feel today are part of this "legacy of angst" that began the moment the Puritans landed. But couldn't it be argued equally plausibly that our capacity for anxiety about power and (especially) success has given way to a largely guilt-free pursuit of these worldly goods? And hasn't the Calvinist strand of American religion yielded to a more benign and less terrifying vision of God the comforter and buddy rather than the God of justice and judgment whom Lincoln invoked? Isn't the point of most religion in modern America to "meet our needs"—however we may define them? Can religion so understood serve as a counterweight to shallowness and narcissism?

Tacit political advocacy is one way that Diggins's work breaks through the bounds of intellectual history, narrowly understood. There is another. Early on, Diggins tells us that he has "a problem with schools of thought that claim we can get along without the authority of truth." Not surprisingly, he criticizes contemporary antifoundationism and social constructionism, and he reminds us that the "denial of truth" was at the heart of the pro-slavery position against which Lincoln fought. This raises an inescapable question: Where is the authority of truth in our own time? Do we continue to accept as self-evident the truths of the Declaration of Independence? If not, what is to replace the Founders' epistemological confidence? Taken at its word, Diggins's distinguished intellectual history leads beyond itself to a far older tradition—to political philosophy.

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High-tech conundrums

DAVID SKINNER

MONEY doesn't wear a three-piece suit anymore, Dinesh D'Souza reports in his new book *The Virtue of Prosperity: Finding Values in an Age of Techno-Affluence.*† The young Silicon Valley entrepreneur is more likely to don a pair of khakis and a sport shirt; he is unopposed to the wearing of baseball caps.

Intellect also dresses down these days, and so D'Souza, a fellow at the influential American Enterprise Institute in Washington, D.C., writes not with the austerity of a scholar but with the off-the-cuff style of a newspaper columnist. It is a tone well-suited to some of the reporting D'Souza has done.

The book's introduction, for example, describes the cocktail chatter at a Silicon Valley party hosted by Inktomi, a widely used Internet search engine. Typical is the congratulatory bombast of a man in his twenties talking about his hard-working cohorts: "They're changing the way we do business in America. They're the pioneers of a new generation. They're revolutionaries, man. They are opening the doors to a whole new outlook, a new way of life." D'Souza wants to take this claim literally and test its truthfulness. Will technological breakthroughs, proceeding as they have at a mind-sputtering rate, introduce a total transformation of life as we know it and change "our very nature as human beings and possibly introduce a new species into the world, the posthuman?"

That the economy has undergone serious transformation is without question. D'Souza devotes a chapter to the new orbits of wealth reached during the last decade, comparing the net worth of individual billionaires to that of individual countries. Of perhaps more significance is the growing number of investors and how this phenomenon suggests the existence of a new overclass in American society, the largest ever of its kind, a

† Free Press. 256 pp. $26.00.

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majority overclass. This is a remarkable turn in human events, especially considering that, for centuries, political philosophy held that democracies were unstable because the rich would always be few and the poor would always be many.

THERE are, of course, still issues that divide Americans, including whether or not technology, and all the new things that come with it, should be embraced. One side of this debate D'Souza calls the "Party of Yeah," meaning the "economic optimists, cyberspace enthusiasts, technoutopians"; the opposite group he calls the "Party of Nah," which he says is made of "cultural pessimists, environmentalists, social conservatives, egalitarians, religious critics of capitalism, and skeptics about technology." D'Souza says the latter group is unifying the left- and right-wing critiques of technological capitalism, a political development he calls the most significant of our time. Thus the Party of Nah represents a new ideology, one that attacks technological capitalism on the grounds that it is unnatural, causes inequality, and is immoral.

The distinction between the parties of Yeah and Nah is the governing concept of *The Virtue of Prosperity*. D'Souza uses it to shepherd the discussion through issues like "the digital divide," a term that captures how technology has complicated the meaning of inequality. Are American children of different races and economic backgrounds unequal in their ownership and access to computers and, if so, are the less privileged doomed to economic serfdom? Are Americans of different races and socioeconomic backgrounds unequally represented in the high-tech industry, and how does this bode for the future of racial and ethnic equality? When, if ever, will the information revolution reach economies less healthy than that of the United States and adult populations less educated than America's?

D'Souza is especially effective at walking the reader through the basic terms of any such controversy. With his grounding in political theory, he is able to bring new information to old arguments with impressive agility. He thus adds a layer of reflection to turf already covered, but not digested, by the business and news magazines. This layer of thoughtfulness is not, however, the searching intellectual inquiry one might hope for, especially with a subject, technology, that has become putty in the hands of sophists. Though D'Souza ably briefs the reader on the social issues of high-tech society, he neglects important points of contention, giving them far less consideration than they require.

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FOR example, D'Souza claims that today's conservative critique of technological capitalism "goes beyond anything that the traditional enemies of capitalism ever conceived...." This is to say that Karl Marx was a better friend to capitalism than Irving Kristol, whose book D'Souza mentions for having given only two cheers for capitalism. Rather, today's conservative critique sounds very much like the reservations expressed by capitalism's traditional *defenders*, such as Adam Smith or Tocqueville. Here, D'Souza is clearly exaggerating. Another question he raises only to leave unanswered is whether technology, by itself, causes social change—undoubtedly a valuable question in terms of understanding whether we are entering a posthuman phase and whether we have any choice in the matter.

And if D'Souza's Yeah versus Nah distinction is useful as a diagnostic tool, it too easily degenerates into a bludgeon for the Party of Yeah. In an early chapter, D'Souza writes that many people who are happy about America's technology-driven affluence nevertheless have reservations. "The moral divide over affluence and technology doesn't just run between ideological camps; it runs through our own hearts." This fairly captures the dilemma of the person who is excited about his stock in America Online but skeptical about the bruited cultural benefits of the Internet. And that of the person who is glad that some form of genetic therapy may save his child from a life crippled by disease, yet still wonders if cloning is a good idea. Some such mixture of hot and cold feelings is rather common and, one might say, not at all surprising.

But in the second half of the book D'Souza puts his Yeah versus Nah concept to work on all sorts of questions. It becomes another way of distinguishing ancient versus modern political philosophy, with the Greeks in the Party of Nah and Francis Bacon, John Locke, and the American Founders in the Party of Yeah. The Yeah people get to claim credit for building the United States of America and the Nah people end up on the losing side of slavery, poverty, disease, and various other assaults on human dignity. So, don't complain about your word-processing software unless you're ready to take blame for the Crusades. One is reminded of Virginia Postrel's book, which crudely divided the world between "the future and its enemies."

Meanwhile, D'Souza's discussion of man and his relationship to nature deserves more prominence than it achieves. In his discussion of the Founders, D'Souza characterizes the birth of liberal democracy and constitutional government as the result

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of several new insights and beliefs: that man owns his body; that the mission of philosophy should be the relief of man's suffering; that nature is valuable only after man has mixed his labor with it; that a main purpose of government is the protection of commercial enterprise. Man now decides for what purpose his hands should labor, to what ends his property should be put, and judges his government by the degree to which it allows for these things.

These new ideas then become the basis, D'Souza says, for a new human type, the American. "He is charming, open-minded, honest, industrious, frugal, curious, inventive, and optimistic. At the same time, he comes across as cunning, ambitious, self-interested, avaricious." A new human type—such is the social consequence brought about by a determination to advance, through technology, man's material comfort. Later on, D'Souza brings up the new man communism was to have produced, and the social changes brought on by the industrial revolution. Why, one wonders, didn't D'Souza devote his book to describing and analyzing the *new* new man of the information revolution?

MARSHALL McLuhan believed the electronic era would return man to a "tribal" relationship with his surroundings and reverse the alienation the industrial era had brought about. D'Souza seems to agree that many of the worst problems associated with the industrial era are being cured by the information revolution. But the more far-reaching, philosophical question—whether technological man is merely this economy's answer to the 1950s organization man, or if he marks a profound departure from humanity on the order of democratic man—goes unexplored.

When the discussion finally turns to the question of posthuman man, D'Souza pays respect to Leon Kass's great contributions to the bioethics debate. But while recognizing such Party of Nah views, D'Souza makes clear that he believes many of the changes technology offers—designer children, increased life span, brain implants—are simply inevitable. Which leaves the Party of Nah on the wrong side of history. But wait, D'Souza believes these "whiners," as he calls them, will still have a job to do in the future. With thinkers like Plato and Aristotle on their side, the Party of Nah can "supply us with personal horizons of understanding and significance." Put another way, they can help everyone "find values in an age of techno-affluence"—something D'Souza himself promises in his subtitle, but only halfheartedly pursues in this book.

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Why Congress matters

MICHAEL BARONE

IN the interest of full disclosure, I must reveal that David R. Mayhew's *America's Congress*† opens with a quotation from my writing and goes on to include generous praise, of the sort journalists are not used to receiving from academics, for my book *Our Country*. But there is no conflict of interest, because I have the happy duty of reporting that Mayhew's book is splendid, even if one puts these passages aside.

The thesis of *America's Congress* is that members of Congress can make a difference. To most readers that will seem unremarkable, and amply proved simply by the subtitle, "Actions in the Public Sphere, James Madison through Newt Gingrich." Congressman James Madison produced the Bill of Rights and built the Jeffersonian opposition to Alexander Hamilton; Congressman Newt Gingrich produced the first Republican majority in 40 years, which in turn reformed welfare and balanced the budget. Yet in the discipline of political science, Mayhew's proposition is controversial, even heretical. In political science, as Mayhew notes, "public officials are routinely cast as agents or instruments of societal interests or preferences of interest groups, for example, or of opinion distributions residing in electorates and, for the most part, that's that." Political scientists, he says later, regularly ignore what members of Congress do in addition to legislating—especially in foreign policy and as shapers of public opinion and political activism. To the political scientists, congressmen are simply passive "receivers of opinion."

Why do political scientists say such odd things? Because—and here you have my explanation, not Mayhew's—they want their discipline to be a "science," to present falsifiable theories, to produce "analytically orderable" data, to quantify. And so Mayhew himself quantifies. He combs through 38 narrative

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histories (including my own *Our Country*) and counts every mention of a member of Congress. From these mentions, he compiles a list of 2,304 "actions" of congressmen from 1789 to 1988. With this "data set," he proceeds to some enlightening and intelligent conclusions.

"Actions," he explains, include legislative initiatives, but also investigating, taking stands on issues, intervening in foreign policy, expressing opposition to presidential policies, even extraconstitutional duties, such as serving on presidential commissions or on treaty-negotiating delegations. These last "actions" are rare but not necessarily unimportant. For example, members of Congress, including those of the opposition party, were often included on treaty-negotiating delegations between 1898 and 1945; Woodrow Wilson's refusal to take any with him to Versailles had disastrous results. Surprisingly, legislative actions amount to less than half of the total "actions." (Some actions fall into more than one of his categories.) Investigations, almost entirely a twentieth-century phenomenon, have been on occasion important, from the progressive investigations launched early in the century, to the anti-Communist investigations that stretch from the 1930s to the 1950s, to the liberal investigations of the 1960s and 1970s. Mayhew suggests that they have been replaced by independent-counsel investigations; but now that Congress has wisely allowed the independent-counsel law to lapse, perhaps there will be explosive congressional investigations once again.

Most important is congressional opposition to the president. Mayhew uses his data set to identify "clusters of opposition" that have resulted in major political controversy and, often, change. For example, congressional opposition to presidents led to the creation of new political parties in the 1790s, 1830s, and 1850s—think of Congressman James Madison and the Democratic-Republicans, Senator Henry Clay and the Whigs, and Senator Stephen Douglas, whose Kansas-Nebraska Act split his own Democrats and inspired the creation of the Republican party. About half the clusters of opposition come from the president's own party, half from the opposition. They almost always come from the majority party in Congress, but not always—for example, the Republican isolationists of 1939-41 and the Republican opponents of the Clinton health-care plan in 1993-94. The point is that Congress is, always has been, and remains a viable center of power, a genuine actor in the political drama, a potential shaper of public policy. American politics is not just one president after another.

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MAYHEW goes against the implicit consensus of twentieth-century historians that presidents have become more important and Congresses less. To the contrary, he says, "the major institutions"—he includes the judiciary and state governments as well as the House and Senate—"have arguably grown more equal in influence and legitimacy." Over the 200 years the Constitution has been in effect, these institutions have become more democratic, more distinct from one another, and more, not less, equal. "Consider the decade of the 1930s, which ordinarily stars an active 'Roosevelt' and a passive 'Congress,'" says Mayhew, in a daring rethinking of New Deal history:

> In fact, it is a fair question whether the 1930s, at least as an epic legislative era, should not be labeled "the age of Wagner" as much as it is "the age of Roosevelt." ... Of course other talented legislators operated in the 1930s too, and Roosevelt was Roosevelt, yet one reading of the significance of the 1932 election might be: It produced a president who would sign Wagner's bills.

Robert F. Wagner, a shrewd politician and key architect of the American welfare state, is high on Mayhew's list of members of Congress who performed 10 or more "actions," with 20, just behind Daniel Webster and Nelson Aldrich and just ahead of James Madison and Sam Rayburn. (Note that Mayhew names not just liberals: At one point, he calls for more scholarly study of effective, but neglected, conservatives like Aldrich and John Sherman, who constructed the apparatus of law that made the nation's awesome economic growth possible.)

Mayhew's statistical apparatus enables him to argue for what he calls "a 'public sphere' model of politics and policy making anchored in separation of powers," as compared to "a more conventional party-centered model in which parties offer programs, voters make choices, a party that wins a majority of those votes implements those choices between elections, and voters hold that party accountable in the next election." Political scientists, many of them fixated with Britain's parliamentary system, have often argued that America has or should have responsible party government, so that action can be taken—liberal action, they usually mean—quickly and expeditiously. But Madison and the other Framers of the Constitution had a different idea, and in fact the competing institutions of American government have seldom been yoked together to move precipitously in one direction. Instead, Mayhew argues, the protracted controversy that follows congressional opposition to

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presidential policy often shapes public opinion and, after periods of deliberation, produces enduring, widely accepted results. Examples include the defeat of the Versailles Treaty in 1919, the defeat of FDR's court-packing proposal in 1937, the successful commitment of the United States to the Atlantic alliance forged between 1947 and 1949, the passage of the Civil Rights Act of 1964, and the defeat of the Clinton health-care plan in 1993.

Starting with quantification, Mayhew ends by praising the architecture of the Constitution and the remarkable stability of the institutions it created. The Constitution gives the president executive powers that, in time of emergency and war, have proved expansive enough for him to take effective action. But by withholding from the president many legislative powers that executives have elsewhere—a full veto, the right to submit legislation for an up or down vote, the power to dismiss the legislature and call new elections—it has reserved for Congress important legislative powers. Often, probably most of the time, Congress exercises them perfunctorily. But the powers are still strong enough to attract many talented politicians, who through legislation, investigation, or simple expression of opposition can not only produce legislative results but can change the political balance itself. "Oppositions have been consequential," Mayhew says. The Radical Republicans passed their Reconstruction bills over Andrew Johnson's veto; Henry Cabot Lodge and his colleagues killed the Versailles Treaty; J. William Fulbright and Eugene McCarthy forced Lyndon Johnson to change his Vietnam policy; Richard Nixon resigned. These congressional powers have been available to Left and Right, to isolationist and internationalist, to segregationists and supporters of equal rights.

FINALLY, in Mayhew's view, *clusters of opposition*, when they act, have the advantage of providing a drama with beginning, middle, and end. Issues are settled, after contention and deliberation, in a way that gives public opinion a chance to develop and have influence:

> In the spring of 1996, Clinton and his Republican congressional opposition, after three years of furiously struggling over the 1993 budget, health care reform, and the Gingrich-Dole budget that resulted in the shutdown of government, more or less gave up. Passions were reined in, headlines shrank, and compromise lawmaking ensued (on welfare reform, a minimum wage hike, portability health insurance, and other subjects)

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before a national audience that was apparently no less ready to move on.

This is not always an aesthetically pleasing process. "Congressional politicians"—he might have added presidents—"have engaged in slow, conflict-ridden, often nasty behavior since the 1790s. Unappealing as that may be, it is a kind of normal politics." Incivility, so often decried in Washington, at least when it is directed at Democrats, is in Mayhew's view a normal and unavoidable part of representative democracy, which has proved stable and successful for more than 200 years.

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The art we deserve

ALVIN KERNAN

LYNNE Munson's heartfelt description of the decline of "the fine arts," as they were once known, makes grim reading. In *Exhibitionism: Art in an Era of Intolerance*,† she traces the appearance since the mid 1960s of what might collectively be called a "Manifesto for a Democratic Art." This new aesthetic declares that painting, literature, theater, and classical music were not the true arts of democratic America but the moribund remnants of an old authoritarian, bourgeois, capitalist, materialistic art that expressed the values of exploiters.

The real artistic energy of modern democracy is to be found in what the obsolescent fine arts once scorned as "kitsch" or "pop art." Deconstruction made this "people's art" intellectually respectable by providing it with an aesthetic that broke down the barriers between the arts and other human activities, emptied out the traditional sense of reality by finding "absence" in "presence" and "presence" in "absence," and politicized art at its roots. In the old fine arts, the artist was an autocrat, standing back like God and paring his finger nails, as James Joyce put it, while the audience groveled before him—always HIM, not HER—and tried to understand his cryptic and sacred meanings. But the new democratic art erases the difference between artist and audience, master and slave.

Photography, movies, television, comic books, amplified rock music, graffiti, collages, advertisements, and performance art: These satisfy far better than the old authoritarian fine arts the prime democratic value of "the Many." Technology, not the painstaking craftsmanship of high art, enables everyone to participate in true democratic art. It doesn't take much time to go to the movies, and no special skills are required to understand and judge them. With cameras becoming cheaper, people can

† Ivan R. Dee. 228 pp. $27.50.

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even make their own movies and act in them, digitize them, and distribute them online. The same for rock and rap music and for photography. Everyone can play. The most democratic arts are the participatory, "interactive" arts, which technology makes possible for everyone.

Democratic art's basic principle is "Art is what we say it is, not some objective reality." When Karen Finley dances naked except for being doused in chocolate syrup covered with alfalfa sprouts to indicate sperm, that's Performance Art, though the Ballet Russe may not want to have anything to do with it. When Andres Serrano dunks a crucifix in his urine to create *Piss Christ*, that's Political Art showing the triumph of individual vitality over religious institutions, death, and suffering. When a chimpanzee daubs colors on a canvas, that's Gonzo Art, sometimes called Natural Art.

An old-fashioned artist trying to paint in the realistic mode of Edward Hopper or Winslow Homer will appeal to the "High Art" of earlier times for justification, but there is no longer any such thing as "High Art." It literally is history, as is all the out-of-date, elitist aesthetic furniture that went with it—the creative imagination, genius, composition, beauty, structure, symbolism, and so on. There is only art, the things that the people choose to admire and call art, and a pile of bricks or a plastic bedpan fit the bill as well as (or better than) Michelangelo or Shakespeare.

IN her study of democratic art, Munson foregrounds the social supports of these arts rather than their actual practice. Art is no longer defined and made in the studio, it would seem, but in the social institutions that were once considered only support activities. Politics and the National Endowment for the Arts, the museums and their exhibitions, the auction houses and the galleries, the teaching of art history in the universities—these are the places where "true art" is defined and found in our time.

At its beginning in the mid 1960s, the NEA supported painters and sculptors who were concerned primarily with the composition of art work. But by the 1990s, the public money was being given to people who tied sticks to themselves and walked up the Westside Highway to demonstrate Puerto Rico's divided views on independence, or who made a trail of ink drops from Hayley, Idaho to Cody, Wyoming. If you have been wondering why Jesse Helms is fuming, you should read Munson's eye-opening description of how the NEA has spent its money.

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Robert Mapplethorpe, Karen Finley, and Serrano are only the well-known scandals.

The museums, except for the Met and the Chicago Art Institute, have closed down their many-stepped and becolumned classical entrances to avoid intimidating the public and suggesting that art towers above life. Inside, once you have worked your way through the coffee bars and the souvenir shops, you will no longer find the traditional progression from the Greeks to the present, with its story of European dominance in the arts and the progress of the creative imagination in a long series of masterworks. Instead, you may first enter a collection of tribal—not "primitive"—art, or even a mixture of everyday objects—quilts, snuff boxes, jewelry, masks, photos—that are meant to remind you that painting and sculpture are no longer the primary arts, only two among many activities, and that European art is only one strain among an infinity of actualities.

The Harvard History of Art Department and the Fogg Museum have long been at the center of the art world, with the museum supplying a rich collection of masterworks in which the students were trained as connoisseurs. Today, the students seldom look at the pictures in the museum, which functions as an independent art gallery. And the offices of the art department have removed to another building, where the students study a variety of unlinked topics ranging from photography to art theory. Painting and sculpture have been dethroned, and the study of art has shifted from the objects themselves to their political, social, or psychological causes and effects. The professors of art—"history of art" is now a derisive term, Munson points out—look so seldom at paintings that they often get their facts about them wrong, while Harvard students have acquired a reputation for ignorance of the art objects.

Munson discusses in passing many artists who continue to be primarily concerned with the media they work in and with the construction of their works. But these artists seem to live in an artistic backwater while all the glitz and action belong to the collectors, professors, grant givers, exhibitionists, and scandal makers. In this world, insofar as they are interested in anything other than money and notoriety, new art dictators pay attention only to art's environment and its social locus. The days of close concentration on the work of art, in painting as in literature, seem to have passed, and in its place we have an interest in some larger context of which it plays a mere part. For all its relativism—"Art is whatever we say it is"—this postmodern conception of art is, as Munson notes, intolerant

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of older views and ferocious in its tyranny over the present. Like so many of the political systems of our time that govern in the name of freedom and the people, our postmodern art, in populist disguise, is driven by the lust for power.

MUST we accept this relativism, wandering toward an endless future of change that has no meaning and no direction? Not at all, though we are surely never going back to the high imperium of Western Renaissance and Romantic art. Art is a historical, not a Platonic reality, and never repeats itself exactly as it changes over time. But art, like our other major social institutions, does have a history, and that history offers a series of possibilities from which to choose what we consider the best and most useful kind of art. We will always, of course, argue over what the best and most useful art of the past has been, but the historical argument takes place in the meaningful terms of what did happen and what was done. And who, looking at the evidence before them, can doubt that Michelangelo and Shakespeare define a much more interesting and useful conception of art than do Electrobang and an icon of the Virgin Mary painted with elephant dung?

Just because a cultural category like art is socially constructed does not mean that we need to live in an infinity of relativism, defining it in any way that someone wants. Our choices are anchored in their history. Traditionally, the best art in the West has been the paintings, statuary, architecture, and literature that are distinguished by the skill with which they are made, and by the insights they offer into our common life. Something meaningful to say, and a powerful style that says it, would seem to be the true art of the Western world. Homer and Titian, not copies of Campbell Soup cans or a pile of bricks randomly arranged, still reveal what art can be for us.

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Can compassionate conservatism govern?

DANIEL J. MAHONEY

WHAT does it mean to govern in a conservative manner? Even to pose this question is to challenge the core libertarian presuppositions underlying conservative political rhetoric over the past two decades. For a generation now, conservatives have been the antigovernment party, championing the vitality of civil society against the intrusions of an overweening bureaucratic and regulatory state. If business-oriented conservatives have been preoccupied with threats to individual liberty and unshackled economic activity, social conservatives have drawn attention to the increasing hostility of the national government to traditional values. But conservative discomfort with the very idea of national government has placed them in a quandary: They wish to govern but fail to articulate a sufficient sense of the legitimacy of national government or the dignity of political life in general. The gap between what conservatives say about politics and how they practice it has become too striking to ignore.

George W. Bush's evocation of "compassionate conservatism" is one response to this "legitimation crisis"—although one crying out for explanation rather than soundbites. This is precisely what historian Marvin Olasky aims to do in his new book *Compassionate Conservatism: What It Is, What It Does, And How It Can Transform America*.† Olasky is a self-described "biblical Christian" who opposes therapeutic and social-engineering approaches to welfare and social policy. He is an old-fashioned defender of personal responsibility, who believes nonetheless that government can play a salutary role in sustaining the network of obligations and the sense of personal responsibility necessary to a free and decent society. While he admits that many critics are tempted to dismiss compassionate conservatism "as a sugary concoction, word candy for a politi-

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cal campaign that seeks not to offend," Olasky sets out to prove them wrong. And for the most part he succeeds but not without raising all sorts of unanswered questions along the way.

MARVIN Olasky is no political philosopher. If one is looking for a comprehensive reflection on the meaning of compassion and its place and limits within a healthy democratic order, this work is not the place to begin. Olasky rests content with a dictionary definition of compassion as "suffering with" and generally uses it as a synonym for biblical charity or mercy. He does not seem to appreciate that the differences between charity and compassion are more than rhetorical. The latter is rooted in feeling or sentiment and can be manipulated in the service of almost any cause (e.g., animal rights). All too often it leads us to look down upon those who suffer. Sentimental identification with others confirms our own superiority and gives rise to a therapeutic understanding of the purposes and possibilities of government—exactly what Olasky opposes.

What Olasky defends is a conservative welfare policy that utilizes the rich array of faith-based groups attempting to transform the lives of the poor in American society. In Catholic social thought, this is an example of the principle of subsidiarity. It emphasizes that social and political problems ought to be addressed at the most fitting level. The central government should not usurp the responsibilities of state governments and municipalities, and government, in general, should not carry out responsibilities best left to families and voluntary associations. This "Catholic" principle has more than a family resemblance to Tocqueville's defense of "the art of association," and it is no accident that both are at the heart and soul of compassionate conservatism as Olasky defines it. But Olasky eschews a direct engagement with either political philosophy or the Catholic natural law tradition. He thus draws on the principle of subsidiarity without naming it and makes one fleeting, inadequate reference to Tocqueville. Only a fuller, more self-conscious defense of government's role would allow conservatives to overcome the debilitating gap between their theory and practice.

Inadequate at the level of political theory, Olasky's book does provide a useful guide to the limits of contemporary welfare policy and sketches the beginnings of a humane conservative alternative. He provides a detailed and often fascinating account of his travels (with his 14-year-old son Daniel) to major American cities to examine the work of faith-based

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groups in confronting and overcoming urban misery and pathology. Olasky makes a compelling case that faith-based groups that emphasize personal responsibility and conversion of soul can change the lives of the poor. He favorably contrasts their efforts to those of secular bureaucracies that address the physical needs of the poor without demanding a change of heart. Even those poverty-fighting institutions that require personal responsibility are hampered by their inability to raise the "God" question and hence to root personal responsibility in a fundamental sense of obligation.

OLASKY shows that the remarkably effective work of faith-based groups in ministering to the bodies and souls of the poor is undermined by meager resources, an often untutored business sense, and a deep suspicion of government. Faith-based groups are legitimately afraid of losing their souls if they accept government grants that would force them to abandon proselytization. These suspicions are well-founded: Olasky describes how at least since the triumph of a new social-welfare orthodoxy in the 1920s, government assistance to organizations working with the poor has been predicated on principles of secularism. In this view, the conversion of the poor somehow violates the spirit or letter of the First Amendment. And for the adherents of this orthodoxy, personal responsibility is largely beside the point. Environmental conditions have made the poor what they are, and restructuring society is thought to be the chief way to solve the problems of poverty.

Olasky argues that there is a beginning of a dent at least in the old conservative orthodoxy. Contemporary conservatives have rejected the Social Darwinism of the previous century, which regarded the misery of the poor as mere fatality or even as nature's way of punishing the weak and irresponsible. Nonetheless, many conservatives still feel uncomfortable with the poor and too often would prefer not to think about them at all. Meanwhile, the welfare establishment still remains far too enamored of secularist and social-engineering assumptions. Olasky believes that these "barriers ... are real and formidable, but they can be crossed." How? Conservatives need to reject the residues of Social Darwinism in their own hearts and mental habits. They also need vigorously to challenge the Left's First Amendment fundamentalism by demonstrating the compatibility between the First Amendment and a pluralistic welfare policy inclusive of faith-based groups.

Conservatives (and faith-based groups) also need to get over

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their very understandable, but ultimately self-destructive, fear of a government role in confronting poverty. Olasky narrates a fascinating account of Mayor Steven Goldsmith's efforts in Indianapolis in the 1990s to "bring civil society back to the inner city." Goldsmith created a "civic switchboard" called the Front Porch Alliance that worked with faith-based organizations to develop "partnerships for neighborhood action." The goal, as Goldsmith put it, was to have "enough government participation to be supportive, not enough to distort." Goldsmith also initiated widespread competition in provision of city services, a change that saved Indianapolis $400 million during his tenure as mayor. In Olasky's eyes, Goldsmith provides a model of a reformist conservatism that is not afraid of using government to promote conservative ends. Olasky draws a sensible conclusion for conservatives operating at the level of national politics: Similar leadership needs to be provided by a conservative president who will use his bully pulpit to challenge the barriers in the way of a humane reconstruction of welfare policy in the United States.

YET for all his good sense, Olasky seems to reduce the role of the federal government to a mere facilitator of social services by state and municipal governments and faith-based organizations. He forgets that there are some aspects of social policy that the federal government handles well and that ought to remain within its purview. This recognition is perfectly compatible with the principle of subsidiarity properly understood. This principle allows, even requires, the national government to fulfill those responsibilities that fall within its sphere.

Olasky is also too narrowly focused on the efficacy of faith-based groups in the provision of social services and too enamored of biblical categories and language. He does not speak the "grammar" of natural law—that civic and philosophical language that speaks to man as man. Because he does not investigate the tradition of political philosophy, he does not benefit from the help that Adam Smith provides in understanding "the moral sentiments" that bind human beings in a free society; nor does he appreciate Tocqueville's rationale for "the art of association." Olasky understands that true conservatism rejects individualism—the myth of personal autonomy—as a pernicious conceit. But he is able to state that rejection only in biblical terms. That is a good, but not sufficient, start for the articulation of a morally serious conservative public philosophy for our time.

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MICHAEL BARONE is a senior writer at *U.S. News & World Report*, co-author of the *Almanac of American Politics*, and author of *Our Country: The Shaping of America from Roosevelt to Reagan* (Free Press, 1990).

MILTON FRIEDMAN is a senior research fellow at the Hoover Institution and author (with Rose D. Friedman) of *Two Lucky People* (University of Chicago Press, 1998). He received the Nobel Memorial Prize for Economic Science in 1976.

PETER FRUMKIN is assistant professor of public policy at Harvard University's John F. Kennedy School of Government, where he is affiliated with the Hauser Center for Nonprofit Organizations.

WILLIAM A. GALSTON is a professor in the School of Public Affairs at the University of Maryland and director of the Institute for Philosophy and Public Policy.

ALVIN KERNAN is author of *In Plato's Cave* (Yale University Press, 1999) and is at work on *The Fruited Plane: Satires on Y2K America*.

DANIEL J. MAHONEY is associate professor of political science at Assumption College in Worcester, MA, and author of the forthcoming *Aleksander Solzhenitsyn: The Ascent from Ideology* (Rowman and Littlefield, 2001).

PIETRO S. NIVOLA is a senior fellow at the Brookings Institution.

JEFFREY O'CONNELL is Samuel H. McCoy II Professor of Law at the University of Virginia. RICHARD F. BLAND is a former deputy chief of staff for Daniel Patrick Moynihan. Their essay is excerpted from a forthcoming article in the *University of Illinois Law Review*.

PAUL H. ROBINSON is the Edna and Ednyfed Williams Professor of Law at Northwestern University.

DAVID SKINNER is an associate editor of the *Weekly Standard*.

SARAL WALDORF, a public health anthropologist, has worked and taught in Africa and Asia and has served with the Peace Corps in Cameroon, Malawi, and Turkmenistan.

ADAM WOLFSON is executive editor of *The Public Interest*.

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